

No. 11620

United States
Circuit Court of Appeals
For the Ninth Circuit.

THEODORE F. BOVICH,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

Apostles on Appeal

Upon Appeal from the District Court of the United States
for the Northern District of California,
Southern Division

FILED

JUN - 7 1947

PAUL P. O'BRIEN,
CLERK

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in *italic*; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in *italic* the two words between which the omission seems to occur.]

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Proctors for Appellee.

United States District Court for the Northern
District of California, Southern Division

No. 24525-S

THEODORE F. BOVICH,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

CITATION ON APPEAL

United States of America—ss.

The President of the United States of America to
United States of America, Greeting:

You Are Hereby Cited and Admonished to be and appear at a United States Circuit Court of Appeals for the Ninth Circuit, to be holden at the City of San Francisco, in the State of California, within thirty days from the date hereof, pursuant to an order allowing an appeal, of record in the Clerk's Office of the United States District Court for the Northern District of California, Southern Division, In Admiralty wherein Theodore F. Bovich is the appellant, and you are appellee, to show cause, if any there be, why the decree or judgment rendered against the said appellant, as in the said order allowing appeal mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness, the Honorable Michael J. Roche, United States District Judge for the Northern District of California, Southern Division, this 28th day of April, A. D. 1947.

.....,

United States District Judge.

Receipt of a copy of the within citation and admission of service is hereby acknowledged this 29th day of April, 1947.

/s/ FRANK J. HENNESSY,
U. S. Attorney Per T. S.
/s/ JOHN H. BLACK,
/s/ EDW. R. KAY,
Proctors for Respondent and
Appellee.

[Endorsed]: Filed April 29, 1947.

In the District Court of the United States, in and
for the Southern Division of the Northern Dis-
trict of California, in Admiralty

No. 24525 S

(Seaman's Action)

THEODORE F. BOVICH,

Libelant,

vs.

UNITED STATES OF AMERICA, a Nation,
Respondent.

LIBEL

(Damages for Personal Injuries—\$25,000.00)

The libel of Theodore F. Bovich, late a sea-
man on board the American steamship "Charles J.
Colden," against the above-named respondent, in a
cause of libel, civil and maritime, for damages for
personal injuries, alleges as follows:

1. That the libelant is now and was at all times
herein mentioned a resident of the County of Ala-
meda, State, and Northern District, of California.

2. That the respondent is now and was at all
times herein mentioned a nation.

3. That the War Shipping Administration is
now and was at all times herein mentioned an
agency of said United States of [1*] America.

4. That, as libelant is informed and believes and
therefore alleges, the respondent is now and was at
all times herein mentioned the owner and operator

* Page numbering appearing at foot of page of original certified
Transcript of Record.

of the steamship "Charles J. Colden," which vessel is now and was at all times herein mentioned employed and engaged as a merchant vessel of the United States Merchant Marine.

5. That at all times on and about the 3rd day of January, 1945, and at the time libelant was injured as hereinafter set forth, libelant was employed by the respondent United States of America, through the War Shipping Administration, as a seaman, to wit, as an able-bodied seaman, on board said steamship "Charles J. Colden," and libelant was at all of said times working on board said steamship in the course of his said employment; that at all times on and about said 3rd day of January, 1945, said steamship "Charles J. Colden" was afloat on navigable waters at Oro Bay, New Guinea.

6. That on or about the 3rd day of January, 1945, respondent was engaged in loading said vessel and in the course of said loading was loading large, heavy crates upon the main deck of said vessel; that at said time respondent negligently failed to have any licensed or other officer overseeing or supervising said loading of said vessel; that at said time the boatswain of said vessel was an employee of the respondent and the superior officer of libelant whose orders libelant was compelled to obey; that at said time said boatswain negligently ordered libelant to carry a garbage can on said main deck between large, heavy crates thereon, although there was no clear, open, nor safe passageway on said deck through which libelant could carry said garbage can in accordance with said order without danger of

being injured in said loading of said vessel; that respondent negligently failed to have such a clear, open, and safe passageway for libelant to [2] carry out such order, and respondent negligently failed to furnish libelant with a safe place to work in that there was no clear, open, nor safe passageway, as aforesaid; that at said time, and in obedience to said negligent order, libelant was carrying said garbage can along said deck between two of said crates when respondent negligently caused and permitted a large crate being loaded on said deck and being carried by ship's gear, to strike against another large crate, thereby causing said last-mentioned crate to strike against and to crush the lower part of libelant's right leg and ankle between the said last-mentioned crate and said garbage can, whereby libelant was made weak, sick, sore, lame, and disabled, and caused to suffer contusions, bruises, and lacerations of his right leg, a compound fracture of his right tibia and right ankle, punctured arteries of said leg, damage to the nerves of said leg and ankle, and great nervous shock; that the aforesaid negligence of respondent directly and proximately caused libelant to be injured as aforesaid;

That because of said injuries, libelant has ever since receiving the same been weak, sick, sore, stiff, lame, and disabled, and always will be weak, sick, sore, stiff, lame and disabled;

That because of said injuries, libelant has ever since receiving the same suffered and always will suffer great physical pain and mental pain and anguish.

7. That immediately prior to being injured, as aforesaid, libelant was in good physical and mental condition and earning, or capable of earning, at his said occupation of ablebodied seaman, wages at the rate of approximately \$400.00 per month, but because of said injuries libelant has been unable to work or earn any money whatsoever since said 3rd day of January, 1945, and will be unable to work or earn any money whatsoever for a long period of time in the future and thereafter will be unable to work or [3] earn money except at great financial loss, but in this connection libelant alleges that he was paid the sum of \$266.67 in accordance with the general maritime law, which sum is equivalent to his base wages for the period from January 3, 1945, to March 23, 1945, the date when the voyage of said vessel for which libelant had been employed ended.

8. That by reason of the premises, libelant has been damaged in the sum of \$25,000.00, which amount libelant asks this Court to award him.

9. That more than sixty (60) days prior to the commencement of this suit, libelant presented his claims herein, in writing and in accordance with law, to respondent and to its agents, War Shipping Administration and Shepard Steamship Company, but said respondent and its said agents have failed to notify the libelant in writing or otherwise of a determination upon such claims, and therefore said claims are presumed to have been administratively disallowed and libelant is entitled to enforce his claims by this court action.

10. That all and singular the premises are true

and within the admiralty and maritime jurisdiction of the United States and of this Honorable Court.

And for a Second Cause of Libel, Libelant Alleges as Follows:

1. Libelant re-alleges each and every allegation contained in the introductory part of the foregoing cause of libel and each and every allegation contained in paragraphs numbered 1 to 5, both inclusive, 9 and 10 of said foregoing first cause of libel.

2. That on or about the 3rd day of January, 1945, while libelant was working in the course of his said employment as an ablebodied seaman and carrying a garbage can on the main deck of said vessel, his right leg and ankle became caught and crushed [4] between a large, heavy crate and said garbage can, whereby libelant was made weak, sick, sore, lame, and disabled, and caused to suffer contusions, bruises, and lacerations of his right leg, a compound fracture of his right tibia and right ankle, punctured arteries of said leg, and damage to the nerves of said leg and ankle, and great nervous shock.

3. That because of said injuries, libelant has been unable to work or earn any money since said 3rd day of January, 1945, has been an outpatient at the San Francisco Marine Hospital ever since the 23rd day of May, 1945, and for necessary care and medical treatment of said injuries has been compelled to maintain himself from said 23rd day of May, 1945, until the present time, and as libelant is informed and believes and therefore alleges, he will be unable to work or earn money for a period of

180 days in the future, and during said 180 days libelant will be necessarily compelled to maintain himself for necessary care and medical treatment of said injuries; that said care and medical treatment has been and will be, during all of said periods, of benefit to said injuries of libelant; that said periods are reasonable periods for the allowance of maintenance to libelant; that under the general maritime law, libelant is entitled to and claims maintenance at the reasonable rate of \$5.00 per day from said 23rd day of May, 1945, to the present date and for said period of 180 days in the future; that by reason of the premises libelant is entitled to and claims maintenance in the reasonable sum of \$2,375.00, no part of which has been paid except the sum of \$581.25, and the balance, to wit, the sum of \$1,793.75, is due, owing, and unpaid by respondent to libelant, and libelant asks this Court to award him said sum of \$1,793.75.

Wherefore, libelant prays that a citation in due form of law, according to the courses of this Honorable Court in causes [5] of admiralty and maritime jurisdiction, may issue against respondent, citing it to appear and answer on oath all and singular the matters as aforesaid, and that this Honorable Court may be pleased to decree to the libelant the sums asked for by the libelant in the aforesaid libel, and for costs and for such other and further relief as in law and justice libelant is entitled to receive.

/s/ ALBERT MICHELSON,
Proctor for Libelant. [6]

State of California,
City and County of San Francisco—ss.

Theodore F. Bovich, being first duly sworn, deposes and says:

That he is the libelant above named; that he has read the foregoing libel and knows the contents thereof; that the same is true of his own knowledge except as to those matters therein stated upon his information or belief, and as to those matters he believes it to be true.

THEODORE F. BOVICH.

Subscribed and sworn to before me this 16th day of March, 1946.

[Seal] /s/ LOUIS WIENER,
Notary Public in and for the City and County of
San Francisco, State of California.

[Endorsed]: Filed Mar. 18, 1946. [7]

[Title of District Court and Cause.]

ANSWER OF RESPONDENT UNITED
STATES OF AMERICA

Comes now respondent, United States of America, a nation, and answering the libel herein alleges as follows:

As to the First Cause of Action:

I.

Answering the allegations of Article I, respond-

ent has no information or belief upon the subject, and demands strict proof thereof.

II.

Admits the allegations of Article II.

III.

Admits the allegations of Article III. [8]

IV.

Admits the allegations of Article IV.

V.

Admits the allegations of Article V.

VI.

Answering the allegations of Article VI, respondent alleges that on or about January 3, 1945, United States Army stevedores were loading heavy crates on the main deck of the SS "Charles J. Golden," and that neither said respondent, nor its agents, servants, or employees, had any supervision or control over the loading of said crates; and further answering the allegations of Article VI, respondent alleges that libelant was ordered to carry a garbage can along the said deck of the vessel, to a garbage scow, which was moored along the side of the said vessel, and save and except as hereinabove admitted and alleged, denies the allegations of Article VI.

VII.

Answering the allegations of Article VII, respondent alleges that at the time of the injury to said libelant, said libelant was earning a wage of \$100.00 per month, and respondent alleges that libelant has been paid all of his unearned wages up to the date of March 23, 1945, the date of the termination of said voyage; and further answering the allegations of Article VII, respondent alleges that libelant has been paid all his earned wages, and save and except as hereinabove admitted and alleged, denies the allegations of Article VII.

VIII.

Denies the allegations of Article VIII. Specifically denies that libelant has been damaged in the sum of \$25,000.00, or any other sum or sums, or otherwise.

IX.

Admits the allegations of Article IX. [9]

X.

Answering the allegations of Article X, respondent leaves open all questions of jurisdiction to the above-entitled Court.

As and for a Second, Separate and Distinct Answer and Defense to the First Cause of Action herein, respondent is informed and therefore alleges upon information and belief, that none of the injuries or damages sustained by said libelant, were caused or contributed to by any negligence or care-

lessness of said respondent, or any of its agents, servants or employees, and at the time said libelant received his injury, the said loading and stevedoring work on board the said vessel was under the supervision of the United States Army, and not this respondent.

As to the Second Cause of Action:

I.

Answering the allegations of Article I, respondent refers to its answer to Articles I, II, III, IV, V, IX and X, of the said First Cause of Action, and incorporates the same herein, by reference thereto, as if the same were set forth herein in full.

II.

Answering the allegations of Article II, respondent alleges that on or about January 3, 1945, said libelant received an injury, the extent of which is presently unknown to this respondent, and save and except as hereinabove admitted and alleged, denies the allegations of Article II.

III.

Answering the allegations of Article III, respondent has no information or belief as to the length of time during which said libelant will be disabled, or unable to work, and respondent prays that when said Court determines the said period of time for which libelant will, of necessity, be unemployed, due to said injury, that the said Court allow the said libelant maintenance money at the rate of

\$3.50 per day. Respondent further alleges that any [10] and all medical care necessary to effect a cure of libelant's injuries can be obtained by libelant, free of charge, at the United States Marine Hospital, and save and except as hereinabove admitted and alleged, denies the allegations of Article III.

Wherefore, respondent prays that libelant take nothing against said respondent, except as set forth herein in said answer, and respondent have its costs of suit.

/s/ FRANK J. HENNESSY, R
United States Attorney.
JOHN H. BLACK,
EDW. R. KAY,
Proctors of Counsel for
United States of America.

[Endorsed]: Filed June 6, 1946. [11]

[Title of District Court and Cause.]

OPINION

St. Sure, District Judge

This is a libel in personam basically under the Jones Act (41 Stat. 1007, 46 USCA §688) brought against the United [12] States pursuant to the privilege granted by §1 of the Suits in Admiralty Act (46 USCA §741), and Public Law 17 (Act Mar. 24, 1943, c.26, 57 Stat. 45; 50 USCA §1291). The libel is stated in two causes of action; one for damages and the other for maintenance and cure.

Allegations pertinent to decision on the first, in substance, are: Libelant's employment by the United States through the War Shipping Board, as a seaman on the SS Charles J. Colden: his injury in course of his employment while the vessel was lying in navigable waters and being loaded; negligence of respondent in failing "to have a licensed or other officer overseeing or supervising" the loading; negligence of a boatswain in ordering libelant "to carry a garbage can on said main deck between large heavy crates thereon, although there was no clear, open or safe passageway through which libelant could [execute the order] without danger of being injured"; negligence of respondent in failing to furnish libelant a safe place to work; and damages in the amount of \$2500.

Oral evidence was confined to testimony of libelant and one Kazem-Beck, to both of whom the order was directed. Aside from documentary evidence irrelevant to the only controverted issue, i. e., negligence, this was the only evidence before the Court. The testimony of the two witnesses is in complete harmony. It shows that on January 3, 1945, while the Charles J. Colden was moored portside to a dock at Oro Bay, New Guinea, "the Army" was loading large crates each containing either a tractor or a small tank on the starboard side of the vessel back of No. 4 hatch, by means of boom equipment on the portside. About 9 o'clock [13] a.m. the boatswain ordered libelant and Kazem-Beck to go aft of No. 4 hatch and move a number of empty garbage cans (of ordinary household size) forward

next to the deckhouse (amidship), which was a distance of 50 or more feet. At the time the order was given two crates had already been deposited by Army stevedores near No. 4 hatch. These crates stood about three feet apart and from 18 inches to two feet from the taffrail. Libelant and Kazem-Beck each picked up a garbage can, libelant following Kazem-Beck, who proceeded toward his destination via the space between the taffrail and the first crate. By reason of a starboard list and a slippery deck Kazem-Beck slipped, fell to the deck and his cans went overboard. Libelant then chose his course between the two crates and, for lack of space, instead of carrying his can he "backed up" and dragged it behind him. While so engaged a third crate weighing two tons, as it swung on the boom, hit one of the two stationary crates between which libelant was passing. The crate so struck moved and "jammed" libelant's leg between the garbage can and the other crate, resulting in the injury for which damages are sought. Cross examination revealed libelant's knowledge of the loading operation, as well as the fact, that the port deck was clear except for the boom equipment.

Parenthetically, it appears libelant received his wages for the remainder of the voyage and maintenance and cure to a given date.

The essence of libelant's grievance is negligence of the boatswain in allegedly ordering him to carry the cans "between" the crates. There is no evidence to support this alleged order. The order was in

effect to move the cans from one position to another, without specification of any route of travel. There was no negligence involved in that order; and the fact that loading of the crates by boom was in progress did not convert the innocuous order into an act of negligence. See *Crockett v. Brandt*, 2 Cir., 271 F. 415; *The Nacoochee* (D. C. Mass.) 275 F. 876. It is not too much to say that under the circumstances here shown, libelant failed to exercise ordinary prudence in choosing to pass between the crates while he knew other crates were being swung into position. Employment as a seaman does not relieve one so employed from the universal obligation to exercise ordinary care. On the contrary, a seaman assumes the risks incidental to his employment. (*The Cricket*, 9 Cir., 71 F. 2d 61, 63; *Roberts v. U. S. Fisheries*, 1 Cir., 141 F. 2d 288, 293.)

So far as the first cause of action is concerned, the libel must be dismissed for failure of libelant to sustain his burden of proof.

As to the second cause of action counsel for respondent at the trial, in effect, stipulated—at least counsel for libelant made no objection to the calculation—that libelant was entitled to maintenance at the rate of \$3.50 per day for approximately 270 days, a total of \$945.00. This is subject to correction as to the exact number of days. [15]

Decree will be entered dismissing the first cause of action, and in favor of libelant on the second cause of action.

Counsel may submit findings of fact and conclusions of law.

* * * * *

Dated: January 28, 1947.

[Endorsed]: Filed Jan. 30, 1947. [16]

[Title of District Court and Cause.]

ORDER

It Is Ordered:

1. That the first cause of action stated in the libel be dismissed;
2. That libelant recover of and from respondent the sum of \$945.00 as maintenance.

A. F. ST. SURE,

United States District Judge.

Dated: January 29, 1947.

[Endorsed]: Filed Jan. 30, 1947. [17]

[Title of District Court and Cause.]

FINDINGS OF FACT AND
CONCLUSIONS OF LAW

The above-entitled matter having come on regularly for trial on the 4th day of October, 1946, and evidence both oral and documentary having been adduced, the libelant being represented by Robert Reynolds, appearing for Albert Michelson, and J.

Hampton Hoge, appearing for John H. Black and Edward R. Kay, of counsel for United States of America, representing Frank J. Hennessy, United States Attorney for respondent, United States of America, and after due deliberation, the Court makes its

FINDINGS OF FACT

I.

That at all times herein mentioned the libelant was a resident of the County of Alameda, State of California, within this district.

II.

That respondent, United States of America, now is and was at all times mentioned herein a nation sovereign.

III.

That at all times herein mentioned the War Shipping Administration was and is an agency of the United States of America. [18]

IV.

That at all times herein mentioned the vessel, SS "Charles J. Colden", was and now is a merchant vessel of the United States owned and operated by the United States of America.

V.

That on or about the 3rd day of January, 1945, libelant was employed aboard said vessel by the

United States of America as an able-bodied seaman and that at said time the SS "Charles J. Colden" was afloat on navigable waters at Oro Bay, New Guinea; that libelant while so employed suffered an injury.

VI.

It is not true that on or about the 3rd day of January, 1945, or at any other time while respondent was engaged in loading said vessel, said respondent negligently or in any other manner failed to have any licensed or other officer overseeing or supervising sail loading of said vessel.

VII.

It is not true that on or about the 3rd day of January, 1945, or at any other time while respondent was engaged in loading said vessel, said bos'n of said vessel or any other officer or person ordered or negligently ordered libelant to carry a garbage can on said main deck between large, heavy crates thereon. It is not true that at said time there was no clear, open or safe passage on said deck through which libelant could carry said garbage can without danger of being injured.

VIII.

That no negligent order of any kind was given by said bos'n or any other person to said libelant; that with full knowledge on the part of libelant of the existence and availability of a safe, clear and unobstructed route and passageway through

which he should have and could have carried said garbage can, he deliberately and entirely at his own volition and selection chose [19] and used an obviously dangerous route and passageway in the carrying of said garbage can.

IX.

It is not true that on or about the 3rd day of January, 1945, or at any other time, respondent, while engaged in loading said vessel, negligently failed to have a clear, open and safe passageway for libelant to carry out any orders given him; it is not true that at said time and place respondent negligently failed to furnish libelant with a safe place to work. It is true that there was a clear, open and safe passageway for libelant's use as aforesaid. It is not true that at said time and place, in obedience to any negligent order, libelant was carrying said garbage can along the deck of said vessel between two crates, or that respondent negligently caused or permitted a large crate being loaded on said deck and being carried by ship's gear to negligently strike against another crate, thereby causing said last-mentioned crate to strike against and to crush or injure libelant. That any movement of said crates was a normal and reasonably to be expected consequence of proper and careful operation of ship's gear in such loading operations, all of which was and should have been known to libelant.

X.

It is true that libelant was not caused to suffer any injuries as the result of negligence of any kind of respondent.

XI.

It is true that libelant was negligent in carrying out his duties in that he failed to exercise ordinary prudence or care in passing between the crates on board the main deck of the vessel when he knew other crates were being swung into position on said main deck and that some shifting of crates was usual and to be reasonably expected. [20]

XII.

It is not true that libelant suffered or incurred general damages in the sum of \$25,000, or any other sum or sums or otherwise or at all.

XIII.

It is not true that libelant suffered, incurred or contracted personal injury or loss of wages or earnings due to any carelessness or negligence on the part of any agent, servant, officer or employee of the said vessel, SS "Charles J. Colden", or respondent, United States of America.

XIV.

It is true that as a result of certain injuries sustained by said libelant while in the employ of said vessel due solely to his own negligence, he

was on outpatient status at the San Francisco Marine Hospital from and after the 23rd day of May, 1945, to and including the 14th day of September, 1946, and is entitled to maintenance at the rate of \$3.50 per day for such period; it is also true that libelant has been paid maintenance at the rate of \$3.50 per day from the 23rd day of May, 1945, to and including the 18th day of December, 1945.

XV.

It is true that libelant is entitled to maintenance at the rate of \$3.50 per day from the 18th day of December, 1945, to and including the 14th day of September, 1946.

XVI.

It is true that libelant is entitled to the sum of \$945.00 as and for maintenance at \$3.50 per day for 270 days.

XVII.

All and singular, the premises herein are within the Admiralty and Maritime jurisdiction of the United States of America and of this Court. [21]

From the above Findings of Fact, the Court makes its

CONCLUSIONS OF LAW

I.

That libelant is not entitled to recover from respondent, United States of America, any sums for damages for personal injuries incurred by said libelant aboard the SS "Charles J. Colden".

II.

That libelant has failed to sustain the burden of proof of the allegations contained in the first cause of libel.

III.

That the First Cause of Action in said libel should be dismissed.

IV.

That libelant is entitled to recover from respondent the sum of \$945.00 as and for maintenance.

It Is Therefore Ordered that a decree be entered in favor of respondent, United States of America, as to the First Cause of Action, and the said First Cause of Action in the said libel be dismissed and that the said libelant recover from respondent the sum of \$945.00 on his Second Cause of Action as and for maintenance in accordance with the foregoing findings, without costs to either party.

Dated: March 11, 1947.

/s/ A. F. ST. SURE,

Judge of the United States
District Court.

[Endorsed]: Filed Mar. 12, 1947. [22]

In the District Court of the United States
for the Northern District of California,
Southern Division

No. 24,525-S

THEODORE F. BOVICH,

Libelant,

vs.

UNITED STATES OF AMERICA,

a nation,

Respondent.

FINAL DECREE

The above cause having come on regularly to be heard on the pleadings and proofs and having been submitted by the advocates for the respective parties, and after due deliberations having been had and after Findings of Fact and Conclusions of Law having been duly settled and signed;

It Is Ordered, Adjudged and Decreed that libelant take nothing from respondents on his first cause of action, and that the first cause of action be dismissed.

It Is Further Ordered, Adjudged and Decreed that libelant recover from respondents the sum of \$945.00 on the second cause of action, together with interest at the rate of 4% per annum until paid. Each party shall bear its own costs.

Dated: March 11, 1947.

Entered in Vol. 37 Judg. and Decrees at Page 752.

A. F. ST. SURE,

United States District Judge.

[Endorsed]: Filed Mar. 12, 1947. [23]

[Title of District Court and Cause.]

PETITION FOR ALLOWANCE OF APPEAL

The libelant, Theodore F. Bovich, deeming himself aggrieved by that part of the order and decree made and entered in the above entitled cause wherein and whereby the first cause of action in the libel was dismissed, hereby appeals from said part of said order and decree to the United States Circuit Court of Appeals for the Ninth Circuit, for the reasons specified in the Assignment of Errors, which is filed herewith, and petitioner respectfully prays that this appeal may be allowed, that a citation be issued directed to the above named respondent, United States of America, as provided by law, and that a transcript of record and proceedings upon which said decree was based, be duly authenticated and sent to the Circuit Court of Appeals for the Ninth Circuit.

Dated, San Francisco, April 24, 1947.

THEODORE F. BOVICH,

By ALBERT MICHELSON,

His Proctor. [24]

Receipt of a copy of the above Petition for Allowance of Appeal is hereby acknowledged this 29th day of April, 1947.

/s/ FRANK J. HENNESSY, TS

United States Attorney,
Proctor for Respondent.

/s/ JOHN H. BLACK,

/s/ EDWARD R. KAY,

Proctors of Counsel for
Respondent.

[Endorsed]: Filed Apr. 26, 1947. [25]

[Title of District Court and Cause.]

ORDER ALLOWING APPEAL

The Petition of the libelant in the above entitled cause for the allowance of the appeal to the United States Circuit Court of Appeals for the Ninth Circuit is hereby allowed.

It Is Further Ordered that a copy of this allowance of appeal, certified by the Clerk to be such, may be served upon the Proctors for respondent in lieu of personal service.

Dated, San Francisco, April 28th, 1947.

/s/ MICHAEL J. ROCHE,

District Judge.

Receipt of a certified copy of the foregoing Order allowing appeal is hereby acknowledged this 29th day of April, 1947.

/s/ FRANK J. HENNESSY, TS
United States Attorney,
Proctor for Respondent.

/s/ JOHN H. BLACK,
/s/ EDWARD R. KAY,
Proctors of Counsel for
Respondent.

[Endorsed]: Filed Apr. 28, 1947. [26]

[Title of District Court and Cause.]

ASSIGNMENT OF ERRORS

In connection with his petition for appeal, the libelant hereby assigns the following error in the order and decree of this court entered herein.

(1)

The court erred in dismissing the first cause of action in the libel.

(2)

The court erred in decreeing that libelant take nothing by his first cause of action.

(3)

The court erred in finding that it is not true that on or about the 3rd day of January, 1945, or at any

other time while respondent was engaged in loading the vessel SS "Charles J. Golden," said respondent negligently or in any other manner [27] failed to have any licensed or other officer overseeing or supervising said loading of said vessel.

(4)

The court erred in finding that it is not true that on or about the 3rd day of January, 1945, or at any other time while respondent was engaged in loading said vessel, said bos'n negligently ordered libelant to carry a garbage can on said main deck between large, heavy crates thereon, and that it is not true that at said time there was no clear, open or safe passage on said deck through which libelant could carry said garbage can without danger of being injured.

(5)

The court erred in finding that no negligent order of any kind was given by said bos'n or any other person to said libelant; that with full knowledge on the part of libelant of the existence and availability of a safe, clear and unobstructed route and passageway through which he should have and could have carried said garbage can, he deliberately and entirely at his own volition and selection chose and used an obviously dangerous route and passageway in the carrying of said garbage can.

(6)

The court erred in finding that it is not true that

on or about the 3rd day of January, 1945, or at any other time, respondent, while engaged in loading said vessel, negligently failed to have a clear, open and safe passageway for libelant to carry out any orders given him; and that it is not true that at said time and place, in obedience to any negligent order, libelant was carrying said garbage can along the deck of said vessel between two crates, or that respondent negligently caused or permitted a large crate being loaded on said deck and being carried by ship's gear to negligently strike [28] against another crate, thereby causing said last-mentioned crate to strike against and to crush or injure libelant. And the court erred in finding that it is true that there was a clear, open and safe passageway for libelant's use as aforesaid, and that any movement of said crates was a normal and reasonably to be expected consequence of proper and careful operation of ship's gear in such loading operations, all of which was and should have been known to libelant.

(7)

The court erred in finding that libelant was not caused to suffer any injuries as the result of negligence of any kind of respondent.

(8)

The court erred in finding that it is true that libelant was negligent in carrying out his duties in that he failed to exercise ordinary prudence or care in passing between the crates on board the main

deck of the vessel when he knew other crates were being swung into position on said main deck and that some shifting of crates was usual and to be reasonably expected.

(9)

The court erred in finding that it is not true that libelant suffered or incurred general damages in the sum of \$25,000, or any other sum or sums or otherwise or at all.

(10)

The court erred in finding that it is not true that libelant suffered, incurred or contracted personal injury or loss of wages or earnings due to any carelessness or negligence on the part of any agent, servant, officer or employee of the said vessel, SS "Charles J. Golden," or respondent, United States of America.

(11)

The court erred in finding that injuries sustained by [29] libelant while in the employ of said vessel were due solely to his own negligence.

(12)

The court erred in failing to find and hold that libelant was entitled to recover damages for personal injuries sustained by libelant aboard the SS "Charles J. Golden."

(13)

The court erred in failing to find and hold that

libelant had sustained the burden of proof of the allegations contained in the first cause of libel.

(14)

The court erred in finding and holding that libelant was entitled to recover on his second cause of action only.

Dated, San Francisco, April 26, 1947.

ALBERT MICHELSON,
Proctor for Libelant.

Receipt of a copy of the above Assignment of Errors is hereby acknowledged this 29th day of April, 1947.

/s/ FRANK J. HENNESSY T. S.
United States Attorney,
Proctor for Respondent.

/s/ JOHN H. BLACK,
/s/ EDWARD R. KAY,
Proctors of Counsel for
Respondent.

[Endorsed]: Filed Apr. 26, 1947. [30]

[Title of District Court and Cause.)

PRAECIPE FOR APOSTLES ON APPEAL

To the Clerk of the above-entitled Court:

You will please make up, certify, and file a transcript of the record in the above-entitled cause upon the appeal thereof to the Circuit Court of Appeals

for the Ninth Circuit, and incorporate therein the following:

1. The libel.
2. The answer of respondent.
3. The reporter's transcript.
4. The opinion of St. Sure, District Judge, filed January 30, 1947.
5. The order filed January 30, 1947.
6. The findings of fact and conclusions of law.
7. The final decree. [31]
8. Petition for allowance of appeal.
9. Order allowing appeal.
10. Citation and admission of service.
11. Assignment of errors.
12. Clerk's certificate to transcript of record.
13. Apostles on Appeal.

Dated, San Francisco, April 26, 1947.

ALBERT MICHELSON,
Proctor for Libelant.

Received copy of the within Apostles on Appeal
this 29th day of April, 1947.

/s/ FRANK J. HENNESSY, T. S.
United States Attorney,
Proctor for Respondent.

/s/ JOHN H. BLACK,
/s/ EDWARD R. KAY,
Proctors of Counsel for
Respondent.

[Endorsed]: Filed Apr. 26, 1947. [32]

District Court of the United States
Northern District of California

CERTIFICATE OF CLERK TO TRANSCRIPT
OF RECORD ON APPEAL

I, C. W. Calbreath, Clerk of the District Court of the United States, for the Northern District of California, do hereby certify that the foregoing 32 pages, numbered from 1 to 32, inclusive, contain a full, true, and correct transcript of the records and proceedings in the libel of Theodore F. Bovich vs. United States of America, No. 24525 S, as the same now remain on file and of record in my office.

I further certify that the cost of preparing and certifying the foregoing transcript of record on appeal is the sum of \$3.20 and that said sum has not been paid by the attorney for appellant and that appellant is a seaman proceeding under 28 USCA, Sec. 837, without prepayment of costs. I further certify that the annexed is the original Citation & Admission of Service.

In Witness Whereof, I have hereunto set my hand and affixed the seal of service of said District Court at San Francisco, California, this 6th day of May, A.D. 1947.

[Seal]

C. W. CALBREATH,
Clerk.

/s/ E. H. NORMAN,
Deputy Clerk. [33]

In the District Court of the United States, for the
Northern District of California, Southern Division

Before: Honorable A. F. St. Sure, Judge.

No. 24,525-S

THEODORE F. BOVICH,

Libelant,

vs.

UNITED STATES OF AMERICA,

Respondent.

Friday, October 4, 1946, 10:00 A.M.

Appearances:

Robert Reynolds, Esq., for the Libelant.

J. Hampton Hoge, Esq., and Henry Schaldach,
Esq., for the Respondent.

The Clerk: Bovich versus The United States,
for trial.

May I state for the record that Mr. Robert Reynolds appears on behalf of the Libelant, and Mr. J. Hampton Hoge and Mr. Henry Schaldach for the Respondent.

Mr. Reynolds: If it please the Court, this is a Seaman's action arising out of an injury incurred on the Charles J. Colden on the 3rd day of January, 1945. Mr. Bovich signed on the ship here in San Francisco about the 11th day of October, 1944, and then made a trip to New Guinea.

The Court: Made what?

Mr. Reynolds: Made a trip to New Guinea on the ship.

The ship was in Oro Bay. On the 3rd day of January, 1945, in loading operations, when this accident occurred, Mr. Bovich was an able-bodied seaman aboard the ship; he had been ordered by the boatswain, with another able-bodied seaman named Kazem-Beck to go to the aft part of the ship and move some garbage cans. He was engaged in this activity and moving these cans between two large crates that were placed on top of a deck load of lumber, when one of the crates was bumped by another in loading operations. He was caught between the crate and the ash can he was moving. He sustained a compound comminuted fracture of his right tibia just above the ankle. He was taken to the hospital in New Guinea and remained there for four or five months before he was returned to the United States and checked in in San Francisco at the Marine Hospital on the 23rd [2*] day of May, 1945. From the 23rd day of May, 1945, until the 6th day of March, 1946, he was an out-patient at the Marine Hospital.

The Court: Here in San Francisco?

Mr. Reynolds: In San Francisco, yes, Your Honor.

The negligence is based upon the fact that he was not furnished a safe place to work, and upon the negligent order of the boatswain.

We will call Mr. Kazen-Beck?

*Page numbering appearing at top of page of original Reporter's Transcript.

The Court: Do you wish to make a statement, Mr. Hoge?

Mr. Hoge: No, your Honor.

The Court: Well, what is the defense? I suppose the defense is there was no negligence?

Mr. Hoge: No, we are representing the United States here, and we believe this thing was due to the negligence of the Army that was handling these operations at the time.

The Court: Of the Army?

Mr. Hoge: Yes.

The Court: Well, the Army of what, the United States?

Mr. Hoge: The United States Army.

The Court: Yes.

Mr. Hoge: Well, the question arises again whether or not there was any liability upon the part of the United States for the negligence of an enlisted man in the Army. That matter came before your Honor some time back, as I recall it. [3]

The Court: Has this same question been before me before?

Mr. Hoge: Yes, it has, but your Honor decided the case on another point, on a jurisdictional question.

The Court: Let's make clear this issue. The charge is there was negligence, and negligence on board a boat that was being operated by the United States of America. Is that right?

Mr. Hoge: The War Shipping Administration.

The Court: Well, what is it? The suit is against the United States of America, respondent. The War

Shipping Administration, of course, is an agency of the Government, of the United States.

Mr. Hoge: Yes.

The Court: There can be no question about that.

Mr. Hoge: No, your Honor.

The Court: Just what is the issue here for me to try? The suit is for negligence, for personal injuries, charging negligence on a boat operated by an agency of the United States. The suit is against the United States of America. Just, then, what is the issue?

Mr. Reynolds: Well, if it please the Court, I think the evidence will show the Army was handling the winches and doing the stevedore work, loading the cargo aboard this ship. However, the charge of negligence upon which the libelant relies, is the fact that he was not furnished a safe place to [4] work and was negligently ordered to work in this position of danger. It would be a proposition where concurrent negligence was involved, assuming the evidence shows that the Army stevedores were negligent and did contribute to the accident.

The Court: Well, is there anything peculiar or unusual about the issue that will be submitted to the Court?

Mr. Reynolds: No, I don't believe so.

Mr. Hoge: No, your Honor.

The Court: Then the issue is as to whether or not the United States of America, or its agents, are guilty of negligence. Is that right?

Mr. Reynolds: Yes, your Honor.

The Court: Is that right?

Mr. Hoge: Yes, your Honor.

Mr. Reynolds: And the charge of negligence is based upon the failure to furnish——

The Court: A safe place to work.

Mr. Reynolds: A safe place to work, and the negligent order of the boatswain.

The Court: What boat?

Mr. Reynolds: The boatswain.

The Court: Of the boatswain?

Mr. Reynolds: Yes, your Honor.

The Court: All right. Go ahead. [5]

ALEXANDER N. M. KAZEM-BECK

called as a witness for the Libelant, sworn:

The Clerk: Will you state your name to the Court.

A. Alexander N. M. Kazem-Beck.

Direct-Examination

By Mr. Reynolds:

Q. Mr. Kazem-Beck, will you state your residence to the Court?

A. My residence, sir?

Q. Yes.

A. 529 - 8th Avenue, San Francisco, 18.

Q. How long have you lived at that address?

A. Three years next month.

Q. Are you a seaman by trade?

A. I am, sir.

(Testimony of Alexander N. M. Kazem-Beck.)

Q. How long have you been going to sea?

A. Three and one-half years.

Q. At the present time are you still in the Merchant Marine? A. Yes, sir.

The Court: You said you live in San Francisco and have been living here three years?

A. Three years at this address. My own home. Three years ago I bought this house.

Q. (By Mr. Reynolds): You have been going to sea three and one-half years? A. Yes, sir.

Q. And are still a member of the Merchant Marine? A. I am, sir. [6]

Q. Do you hold a license?

A. Second Mate, Second Officer.

Q. What was the last ship you were on?

A. The Robert C. Grier.

Q. Were you sailing as second mate on that ship? A. Yes, sir.

Q. When did you get off?

A. Yesterday morning, sir.

Q. Were you a member of the crew of the Charles J. Colden in January, 1945?

A. Yes, sir.

Q. In what capacity were you serving at that time? A. Able-bodied seaman.

Q. Do you recall the approximate date when you signed on that ship?

A. Yes, it was October 11, 1944.

Q. After you left San Francisco on the Charles J. Colden, just where did you go?

A. We went to New Guinea, from there we went

(Testimony of Alexander N. M. Kazem-Beck.)

to the Philippine Islands, back to New Guinea, and to the States.

Q. Do you recall an accident that occurred to an able-bodied seaman by the name of Bovich aboard that ship? A. Yes, I do.

Q. Where was the ship at that time?

A. Oro Bay, New Guinea.

Q. Do you recall about how long you had been in Oro Bay at the time of the accident?

The Court: What Bay was that?

A. Oro Bay, O-r-o. No, I do not recall just how many days we laid there before the accident happened, but it has been a few days.

Q. (By Mr. Reynolds): At the time this accident occurred [7] were you anchored out in the stream, or moored to a dock?

A. Moored to a dock.

Q. What side to was the ship?

A. Port side to.

Q. Were any loading and unloading operations going on at that time?

A. There was loading operations of loading big crates containing either tractors, caterpillar tractors, or small tanks, one of the two. We were loading them from the dock which was on the port side of the ship, back of No. 3 Hatch.

Q. Do you know——

A. No. 4 hatch. I am sorry, my mistake.

Q. Do you know a seaman by the name of Theodore Bovich? A. Yes, I do.

(Testimony of Alexander N. M. Kazem-Beck.)

Q. Were you working with him at the time he was injured, on the 3rd day of January, 1945?

A. Yes. He and I got orders to move some garbage cans.

Q. Can you tell the approximate time of day the accident occurred?

A. Roughly, around 9:00 in the morning. I gave a detailed report about the accident to the Captain of our ship.

The Court: We will have a recess of five minutes and suppress the noise of some of the janitors.

(Recess.)

(Question and answer read by the Reporter.)

The Witness: I have given a detailed report, a written report to the Captain of the ship, Mr. Fletcher, Captain Fletcher. [8]

Q. (By Mr. Reynolds): Where were you working at the time you were given this order?

A. Up in No. 4 Hatch. At the time I was given the order?

Q. Yes. A. I was working forward.

Q. That would be forward the midships house?

A. Yes, that is right, forward of the midships house.

Q. Who was working with you at the time?

A. Mr. Bovich was.

Q. Who gave the order?

A. The boatswain.

Q. What was the order?

A. The order was to go back aft to No. 4 Hatch

(Testimony of Alexander N. M. Kazem-Beck.)

and move a number of cans, approximately 12 of them, empty garbage cans, to move them forward next to the deck house.

Q. Did you comply with the order immediately?

A. Immediately, sir, yes, sir.

Q. Did the boatswain go to the aft part of the ship with you? A. No, he did not.

Q. Were any of the mates present when you started to do this work? A. No, sir.

Q. Were any loading operations going on at this time? A. Yes, indeed.

The Court: Were you alone?

A. Bovich and I, the two of us.

Q. You and Bovich moved forward to move the cans? A. Moved aft, from forward.

Q. To move the cans?

A. To move the cans, yes, sir. [9]

The Court: All right.

Q. (By Mr. Reynolds): You say there were loading operations being conducted when you got back there? A. Yes, at No. 4 Hatch.

Q. Just describe what occurred from there on?

A. Well, they put on a couple of big crates.

The Court: "They"—who?

A. The Army.

Q. They put them in, or they were there?

A. Sir?

Q. You say they put in a couple of big crates.

A. That is right, the Army stevedores placed a couple of big crates containing these caterpillar tractors, or something of that sort.

(Testimony of Alexander N. M. Kazem-Beck.)

Q. Let's be specific about this. Did they put them in after you got there, or were they there when you got there?

A. What I mean to say, the moment we got back to No. 4 Hatch, there were two crates already standing on the starboard side of No. 4 Hatch.

The Court: Mr. Reynolds, conduct the examination.

Mr. Reynolds: Yes.

The Court: It appears that when he got back there, there were two crates.

Mr. Reynolds: Yes, your Honor.

The Court: That had already been placed there. Is that right? [10]

A. That is right, sir.

The Court: Go ahead.

Q. (Mr. Reynolds): What was the approximate size of those crates?

A. I would say they were about 12 feet long by 7 feet high, by about 8 feet wide, each.

The Court: What are these crates?

A. What?

Q. Where did you come from?

A. I came from Russia, sir, originally.

Q. What do you mean when you speak of a crate? A. I mean a box.

Q. A box?

A. That is right, a box containing either a tractor—I have no way of knowing just what is inside—either a tractor or a tank, or something of that sort.

(Testimony of Alexander N. M. Kazem-Beck.)

Q. You are speaking of crates?

A. That is right.

Q. Was there more than one?

A. There were two of them, sir.

Q. Were they wooden?

A. Yes, the containers were wooden, the boxes were wooden.

Q. And were they wooden boxes?

A. Wooden boxes, yes, sir.

Q. You know what a wooden box is?

A. Yes, I do.

Q. In America, and I suppose in Russia too, you have seen these crates, in England and other countries, that contain what they call "litter"?

A. No, I have not, sir. [11]

Q. At any rate, when you say this was a crate, it was a box? A. That is right.

A. A wooden box? A. That is right, sir.

Q. Boarded up all the way on three sides?

A. That is correct, sir.

The Court: Go ahead.

Q. (Mr. Reynolds): Just where were these two boxes located, Mr. Kazem-Beck?

A. They were located on the starboard side of the ship, about between a foot and a half and two feet from the taffrail or top of the bulwark, and were about three feet from each other.

The Court: Is that important?

Mr. Reynolds: Yes, it is, your Honor.

The Court: All right. Go ahead.

A. They were about three feet apart, and the

(Testimony of Alexander N. M. Kazem-Beck.)

only two possible ways we could carry our empty garbage cans would be either, follow the outside passage—in other words, to move them, stepping on the slippery taffrail or between the two crates, or the two boxes, sir.

Q. Was it necessary to pass by these two boxes in order to place the cans where you were ordered to place them?

A. I tried to carry the first garbage can——

The Court: Answer the question.

A. It was.

Q. Now, what about the cans? What is the size of these cans? [12]

A. Probably about three feet high by two and one-half feet wide.

Q. Metal containers? A. Yes, sir.

Q. Such as we know as garbage cans?

A. Regular garbage cans in use on shore.

Q. In America. A. Yes, sir.

Q. You don't know what they were made of, the ordinary circular——

A. Ordinary circular garbage cans.

Q. Garbage cans.

A. Used in every home.

Q. Used in every home, well, they were a good size, weren't they? A. They were, sir.

Q. About how high were they?

A. I would say three feet, perhaps three and one-half feet by about two and one-half feet wide, round.

Q. Yes, and were they filled with garbage?

(Testimony of Alexander N. M. Kazem-Beck.)

A. No, we dumped the garbage previously. In the morning the garbage scow came alongside and we dumped the garbage. We got orders to move these cans right forward of the deck house.

Q. You got orders to move what you might call the garbage cans, where?

A. Right next the deck house, the starboard side.

Q. From where?

A. From where they were, just aft of No. 4 Hatch.

Q. How many feet were you required to move them, about?

A. I would say approximately 50 feet, 60 feet, perhaps. [13]

Q. That is, after they had been emptied?

A. Correct, sir.

The Court: Go ahead.

Q. (Mr. Reynolds): Was there any way you could carry these cans other than through this narrow passageway?

A. There was one possible way to carry them, which was on the outside, about a two or two and one-half foot space between the taffrail and the first box. I tried to do it, but the ship had a starboard list, the taffrail was slippery because of the garbage that had been dumped over. When I tried to, I slipped and fell, the garbage can fell overboard, and I had a bad bruise on the inside of my left thigh.

The Court: Caused by this?

(Testimony of Alexander N. M. Kazem-Beck.)

A. That is right, trying to carry it on the outside, because there was nothing to hold on to.

Q. You mean lift?

A. I was trying to balance myself.

Q. Were you asked to lift these cans?

A. I had to lift it in order to carry it, sir.

Q. I know, but could you not shove them along the deck?

A. Well, if you shoved it, it would amount to the same thing. There was not enough space, of course, to stand, because there was only about a two-foot space between the wooden box and the taffrail, which is the top of the bulwark, so I slipped and fell. The first garbage can went overboard.

Q. Wasn't there room enough on deck to push the can through?

A. No, there was not. [14]

Q. You had to lift it? A. That is right.

Q. You dumped it first before you lifted it?

A. They were all dumped. They were empty cans.

Q. What caused the trouble?

A. Well, the trouble was caused by the fact that there were only two possible ways of carrying these garbage cans, either the way I tried first, which was not successful because I slipped and fell, and the second way was the way Mr. Bovich tried, between the two boxes. There was about a three-foot space in between. So, he was dragging an empty garbage can behind him. He was dragging it, and as he was doing that——

(Testimony of Alexander N. M. Kazem-Beck.)

Mr. Hoge: Could I interrupt? Was the witness looking at the man doing this, or is that something he was told?

The Court: Did you see this?

A. You mean when Mr. Bovich was hit?

Q. Did you see what you are now describing?

A. I did see that. Yes, I did.

The Court: Go ahead.

A. I saw Mr. Bovich start to drag the can. He was backing up, dragging this garbage can behind him, and what happened is this, that he went through where the Army stevedores, when they were placing the next big wooden box with what we call heavy winches, approximately two tons, they hit the adjacent box, the adjacent box moved, and jammed his leg against the garbage can, which, in turn, was jammed against the next [15] box and crushed his leg.

Q. (Mr. Reynolds): Did you see Mr. Bovich while in this position jammed between the crate and the can?

A. I saw him in the position when he started this, but I did not see the actual moment of—

The Court: Impact?

A. Impact. I did not see that, sir.

Q. (Mr. Reynolds): How was your attention attracted to his predicament?

A. Because I heard shouts. My first impression was that the colored stevedores used to fool and play a lot, singing and joking, I did not pay atten-

(Testimony of Alexander N. M. Kazem-Beck.)

tion. All of a sudden it dawned on me that it was Mr. Bovich's voice.

The Court: What?

A. That it was Mr. Bovich's voice. Someone was in distress.

Q. His what? A. His voice.

Q. His voice? A. I recognized his voice.

Q. What did you hear?

A. I heard shouts. No words, just shouts, shouts of pain, just "Ah, Ah, Ah". It is impossible for me to describe.

Q. I know.

A. At the time I had my left trouser leg rolled up looking at the bruise of mine which I sustained trying to bring the first garbage can on the outside, where I fell. I was swearing and cussing. I had my trouser leg up looking at the bruise. All of a sudden I heard the shouts, [16] so I turned around and saw Mr. Bovich jammed between these two wooden boxes. So, the first thing I did, I tried to think of a crowbar, a peevy as the stevedores call it, to use as a lever to lift the box to extricate Bovich from that position.

Q. You saw him?

A. I saw him right there, immediately after it happened.

Q. You saw him jammed?

A. I saw him jammed and what is more, this box was standing on his toes, and it is two tons, a two-ton box.

Q. What was that box?

(Testimony of Alexander N. M. Kazem-Beck.)

A. It has either a tractor or a small tank, one of the two. It weighed two tons, had to be lifted by what we call the jumbo boom.

Q. How could that get on his foot?

A. When the next box was being loaded, it struck this one. This box is on what we call a one by four, a strip of wood nailed underneath so the stevedores can slip a sling under it when lifting it. Evidently it jumped a little and was placed right on his foot, that besides crushing his leg. So, I ran and got what we call a stanchion, which is nothing but a bar which we use for the gangplank. I got this, it was about this round, probably an inch and a half in diameter, but as soon as I tried to lift it, I bent it to a 90 degree angle and could not begin to lift the thing because it was so heavy. Meantime, the Boatswain, Mr. Malone came on and sent to the stevedores, stopped their operations, put a sling around the box and lifted the box so [17] he could lift his leg.

Q. Get out?

A. Get out, yes, sir. He had a bad crush.

Q. How did the box get on his leg anyhow?

A. That is something I don't know, sir. As I said, there was about this much space between the box and the deck, because of the strip of wood. Evidently it just jumped a little bit when it was hit by the next wooden box. It must have jumped.

Q. This was in port?

A. In port, yes, sir.

Q. The ship was moving?

(Testimony of Alexander N. M. Kazem-Beck.)

A. The ship was moored to the dock on the port side, which is the left side.

Q. There is a movement, though, isn't there?

A. No, no movement at all, no, sir.

Q. Why had he got in that critical position?

A. Well, we had our orders. We had to carry out our orders, we had no alternative. We never questioned orders. The Chief Mate gave them to the Boatswain, and the Boatswain gave them to the two of us, knowing we will carry it out immediately, which we did. I tried where it seemed best, but it was not successful, I told you I fell. Mr. Bovich tried the other way, but it turned out to be even worse. There were only two possible ways of doing it, sir.

Q. Only two? A. Only two possible ways.

Q. You tried both?

A. I tried the first way, and he tried the second way.

Q. And they failed. A. Yes, sir. [18]

Q. What was wrong?

A. You ask my opinion, sir?

Q. Well, I am to decide the case, of course.

A. I mean, I cannot question my orders given me, sir. I just carry them out. But, if you are asking my opinion, there was no immediate need of moving the cans, in the first place. They had two cans standing by the steward's department on the port side. There was no need to move the cans, which was proven. After Mr. Bovich was hurt, the cans were left in the same position as they were until

(Testimony of Alexander N. M. Kazem-Beck.)

the loading operations were over. So, there was no immediate need. As a matter of fact, it was contrary to all the rules and regulations of the Merchant Marine.

Mr. Hoge: Your Honor, I have not objected to this. He is giving his conclusion and opinion, and arguing.

The Court: Of course, I inquired for it.

Mr. Hoge: I am not questioning your Honor.

The Court: No, no. I have no right to do it.

The Witness: I am sorry, sir, if I said something out of order, but you asked me, so I gave my opinion.

The Court: Yes. You are not to blame. I asked for it, and the objection of Counsel is proper, of course. Mr. Reynolds, of course, we are trying to get to the bottom of this.

Mr. Reynolds: Yes, your Honor.

The Court: We want the truth, and want to decide the case as near right as we can. [19]

Mr. Reynolds: I am perfectly in accord with that, your Honor.

Q. In other words, you were ordered to proceed aft and to move these garbage cans forward. Is that correct?

Mr. Hoge: That has been asked and answered.

A. Yes, sir.

The Court: Well, it won't hurt to review a little bit. Go ahead, go ahead.

A. That is right, sir.

Q. (Mr. Reynolds): And the Boatswain or the

(Testimony of Alexander N. M. Kazem-Beck.)

Mate did not come aft, or examine the situation as it existed? A. No, sir.

The Court: Where was this, was this in port?

Mr. Reynolds: Yes, your Honor.

The Court: Yes.

A. Oro Bay, New Guinea.

The Court: Well, have we had any testimony at all as to why it was necessary for all this movement of these cans, and so forth.

Mr. Reynolds: No, your Honor, because I think that would be a matter of defense. That is the contention.

The Court: All right. You don't have to say anything further. And the result of all this was that the Libelant was hurt. Was he hurt badly?

Mr. Reynolds: Yes, your Honor. [20]

The Court: Anything further?

Q. (Mr. Reynolds): Mr. Kazem-Beck, did you remain aboard the ship after this accident occurred?

A. Yes, sir, I did.

Q. And Mr. Bovich was immediately removed from the ship? A. Immediately, yes.

Q. Did he return to the ship before you sailed?

A. No, he did not.

Q. When did you sail?

A. We sailed a couple of days afterwards, sir.

Q. Was there any further cargo stored on the starboard side of the ship in the approximate place you had been working?

A. You mean after these two boxes were placed?

Q. Yes.

(Testimony of Alexander N. M. Kazem-Beck.)

A. A number of the same sized boxes.

Q. Were they placed forward or aft of the other two?

A. They were placed aft of the other two. None were placed forward. These two were the first ones.

The Court: What is the point of that?

Mr. Reynolds: Merely to show, your Honor, that these men were placed in an unsafe position. They actually were placing some crates and loading there at the time that the boatswain and the mate ordered them to work in that hazardous position.

The Court: Listen, you say there was something back of it. I don't see what that has to do with it. You mean [21] they were again placed in the hazardous position?

Mr. Reynolds: No, your Honor. They merely continued the loading operations, and loaded some crates in this area where Mr. Bovich was hurt, which indicated they were loading there at the time, but neither Mr. Bovich nor Mr. Kazem-Beck were warned of this.

The Court: This happened after the accident?

Mr. Reynolds: Yes, your Honor.

The Court: What has it got to do? How in any way does it relate to the accident?

Mr. Reynolds: Merely that there was a continuation of the operation, your Honor, that was being conducted at that time.

The Court: Of course the operations continue, you know, in loading a ship.

(Testimony of Alexander N. M. Kazem-Beck.)

Mr. Reynolds: Yes, your Honor.

The Court: So I cannot see any point to it, Mr. Reynolds, unless you make it clear to me. I cannot see it. Of course it is in evidence.

Mr. Reynolds: I won't pursue it.

The Court: You may if you wish to, if there is any point to it.

Q. (Mr. Reynolds): Mr. Kazem-Beck, was the garbage scow alongside the ship at the time the accident occurred?

A. It was not at that time. It was earlier in the morning, [22] not at the time it happened.

Q. Was anything moored alongside the starboard side of the ship?

A. Nothing at all, sir.

Mr. Reynolds: I think that is all.

The Court: Did they dump what you call garbage from the ship on to a garbage boat?

A. A garbage scow, yes, sir, earlier that morning, about 8:00 o'clock. The accident happened somewhere around 9:00. It happened three years ago. I gave a very detailed report to the Captain of our ship. It has been three years ago, so I cannot remember exactly, sir.

Q. You could not be expected to.

A. At the time, I gave a very detailed report to the Captain and the Shephard Line has the report. I gave a very detailed report.

Q. In writing? A. In writing.

The Court: I did not know that during a time of war they dumped garbage on a garbage scow.

(Testimony of Alexander N. M. Kazem-Beck.)

A. Yes, you are not allowed to dump it in the bay, for sanitary reasons.

Q. What bay?

A. Any kind of a bay, like we have in San Francisco.

Q. Of course. Where were you?

A. On my last trip, I got off Friday.

Q. Where were you then? A. Oro Bay.

Q. Where is Oro Bay? A. New Guinea.

Q. I did not know they had regulations there.

A. Oh, yes, indeed.

Q. (Mr. Reynolds): They had regular dock facilities there?

A. Regular dock, dock facilities, garbage scow that moved on out to sea and dumps it over a way out at sea.

Cross Examination

By Mr. Hoge:

Q. Mr. Kazem-Beck, on what side of the ship was it that you first started to carry these cans?

A. The starboard side of the ship, sir.

Q. On what side of the ship was Mr. Bovich when he had his accident?

A. The starboard side.

Q. Both were on the starboard side?

A. That is right.

Q. They had at that time five crates between the hatch and the bulwark, didn't they?

A. No, two.

Q. Did they have any crates over the hatch?

(Testimony of Alexander N. M. Kazem-Beck.)

A. Well, the second crate or box was about three feet, or thereabouts, over the hatch. The space between the taffrail bar and the hatch itself is about 18 feet. If the box was about eight feet, that leaves about three feet over the hatch.

Q. You knew the Army stevedores were loading that ship, didn't you?

A. Oh, yes, sir, I did know it.

Q. You knew they were bringing in these crates?

A. Yes, I did.

Q. On the port side of the ship it was absolutely clear? Nothing was between the hatch and the bulwark? [24]

A. Nothing except the stevedores loading the ship from the port side. It was absolutely clear, was it not? A. That is right.

Q. Now, these cans were relatively light, weren't they? They were galvanized iron cans?

A. Correct, light cans, yes, sir.

Q. You could take them in your hands and lift them up? A. Yes, you could.

Q. And when you were told to carry these cans forward, why, you were not told the way to carry them, what was to do it, what aisles to take?

A. No, we were not.

Q. You were just told to move the cans to some other part of the ship? A. Correct, sir.

Q. Now, it was not until after you heard the hollering, heard Mr. Bovich yell, that you looked to see the predicament he was in. Is that right?

A. That is correct.

(Testimony of Alexander N. M. Kazem-Beck.)

Q. And all these things you testified about, what he was doing and the position he was in, that is just something you have been told, is it not?

A. I did not quite get it?

Q. I say——

The Court: Read it.

(Question read by the Reporter.)

A. No, I actually saw him in this position after the accident happened. I actually saw him beginning to take these cans. I saw him doing this. [25]

Q. How far were you from him?

A. I would say about 20 feet.

Q. What is the distance from this hatch we are concerned with here, to the bulwark on the port side of the ship?

A. You mean the hatch itself? About 18 feet.

Q. What is the distance from the hatch to the bulwark?

A. I said about 18 feet, roughly speaking.

Q. That is on the port side of the ship?

A. Either the starboard or port. The distances are the same.

Mr. Hoge: I think that is all.

Redirect Examination

By Mr. Reynolds:

Q. Mr. Kazem-Beck, you were not told to follow any particular path in taking these cans up, as you testified?

Mr. Hoge: Objected to as leading and suggestive.

(Testimony of Alexander N. M. Kazem-Beck.)

A. No, sir, it was left to us.

Mr. Hoge: It has already been asked and answered.

The Court: I will allow it. Go ahead.

A. No, sir, it was left to us.

Q. (Mr. Reynolds): Why could you not go on the port side of the ship?

Mr. Hoge: Objected to as cross examining his own witness.

The Court: Well, it is, and it calls for a conclusion.

The Witness: May I answer this question? [26]

Mr. Reynolds: Your Honor, the contention is that there was only one passageway that could be used at this time. That was taken by Mr. Kazem-Beck and Mr. Bovich. Mr. Hoge brought out on cross examination an answer that there were no obstructions on the port side of the ship. I want to ask the witness what is the reason, or if there was any reason why the could not go on the port side of the ship.

Mr. Hoge: I think that is hitting below the belt, with a witness who is an intelligent witness sitting and listening to the statement he is making to your Honor, and practically placing the words in the witness' mouth.

The Court: I was wondering what the difficulty was about handling these cans. I heard the witness say he could pick them up, lift them over his head if he wanted to. There isn't any doubt about that, is there?

(Testimony of Alexander N. M. Kazem-Beck.)

The Witness: Except that there was no way of carrying them, because there was only about two feet, or two and a half feet, perhaps, between the box and the taffrail, and it was slippery, and the ship had a starboard list. In other words, you had to balance yourself with nothing to hold on to. When you have a can in your hand, you are just out of luck. That is what happened to me. The other way was between the two boxes. That is what Mr. Bovich did, with disastrous results.

Q. What happened to you? You were not hurt.

A. I was not hurt [27] badly. I was hurt some. I lost a can.

Q. What do you mean, you lost it overboard?

A. I lost it overboard. I fell myself. I had a bad bruise. It was not bad enough to amount to anything; it was a bruise.

Q. Could you not shove those cans along the deck?

A. No, sir. There was not enough space; just enough space to balance myself against the box; then you almost have to be an acrobat to do it. I tried it just for the fun. I did not want to take a chance, as Mr. Bovich did, with disastrous results. It goes against the first rudiments of seamanship.

Q. What is that?

A. An ordinary seaman knows, it tells in his booklet, when stevedores are loading or unloading he is not supposed to go under this thing, even nearby where anything can hit him or fall on him.

(Testimony of Alexander N. M. Kazem-Beck.)

Q. (Mr. Reynolds): What side of the ship were the loading operations being conducted on?

A. On the port sside.

The Court: Just a minute. There is an objection of Mr. Hoge's here. The objection is overruled. You may have an exception.

The Witness: The port side.

Q. (Mr. Reynolds): In which was were the booms connected?

A. They were connected aft of the port side.

Q. On what side of the ship was the dock?

A. The port side.

Mr. Reynolds: I think that is all. [28]

Mr. Hoge: No further questions, your Honor. Well, I might ask him this:

Recross-Examination

By Mr. Hoge:

Q. When you say the booms were on the port side, you mean the gear was over on that side?

A. That is right, sir.

Q. But the aisleway, as you testified, that 18-foot space, was clear, was it not?

A. The 18-foot space?

Q. Yes.

A. It was clear except for the two boxes standing on it.

Q. I mean the port side, not the starboard.

A. No boxes on the port side, no.

(Testimony of Alexander N. M. Kazem-Beck.)

Q. As you testified before, that was clear, wasn't it?

A. It was clear, yes.

Mr. Hoge: That is all.

(Witness excused.)

Mr. Reynolds: Call Mr. Bovich.

THEODORE F. BOVICH

the plaintiff, called in his own behalf, Sworn:

The Clerk: Will you state your full name to the Court, please?

A. Theodore Francis Bovich.

Q. B-o-v-i-c-h? A. That is right.

Direct-Examination

By Mr. Reynolds:

Q. What is your present address, Mr. [29] Bovich?

A. 22745 Victory Drive.

Q. What town? A. Hayward.

Q. How long have you resided there?

A. Approximately nine months.

Q. Have you resided in the Bay Area here?

A. Yes, sir.

Q. For about how long?

A. Nine or ten years.

Q. Are you married or single?

A. Married.

Q. Have you any children?

(Testimony of Theodore F. Bovich.)

Mr. Hoge: Objected to as incompetent, irrelevant and immaterial, your Honor.

The Court: Objection overruled.

A. Yes, sir.

Q. (By Mr. Reynolds): You were an able-bodied seaman with the Merchant Marine in October and January of 1945? A. Yes, sir.

Q. About how long had you been going to sea at that time? A. Since 1942.

Q. Were you sailing as an able-bodied seaman on board the Charles J. Colden on the 3rd day of January, 1945? A. Yes, sir.

Q. When did you sign on that ship?

A. It was in October, the first part of October. I don't remember the date of it.

Q. What is your age, Mr. Bovich?

A. Twenty-seven.

The Court: What?

A. Twenty-seven, sir. [30]

Q. (By Mr. Reynolds): Where did you sign on?

A. At the Army Base, San Francisco Harbor.

Q. After that ship left San Francisco Bay, where did it go? A. To New Guinea.

The Court: Where?

A. To New Guinea.

Q. (By Mr. Reynolds): Did it remain some time in New Guinea?

A. Well, we arrived in Finchhaven and stayed there some amount of time and then went down to Oro Bay, then up to Hollandia, another part of New Guinea, shuttled back and forth there.

(Testimony of Theodore F. Bovich.)

Q. Where was the ship located on the 3rd day of January, 1945? A. In Oro Bay.

Q. And were you moored to a dock or anchored in the stream? A. Moored to the dock.

Q. Just what kind of bay is that? Is that completely closed?

A. Well, yes, I guess it was enclosed, I would say.

Q. You were not out in the open sea?

A. No, we were inside.

Q. Were there breakwaters there?

A. Not right in this particular place.

Q. Were there docking facilities?

A. Yes, sir.

Q. Well, you said the ship was moored. Is that correct? A. Yes.

Q. Which side of the ship was moored to the dock? [31] A. The port side to.

Q. Were loading operations going on at that time? A. Yes, sir.

Q. Calling your attention to this day when you were injured, can you recall the approximate time that occurred?

A. Well, I would say it was between 9:00 and 9:30 in the morning.

Q. Did you receive an order to do this work you were performing at this time? A. Yes, sir.

Q. Who gave you the order?

A. The boatswain.

Q. Were you working at the time you received the order?

(Testimony of Theodore F. Bovich.)

A. I was working up at No. 1 Hatch.

Q. Now, just state what you did when you received this order.

A. Well, we were up there working, and the boatswain came up forward and he says for the other able-bodied seaman and myself to go get the garbage cans in the vicinity of No. 5 Hatch and bring them on forward of these boxes. So, we started to get these garbage cans and Mr. Kazem-Beck, he led the way.

Q. When you got back there, aft the midships house, were any ship's officers present, or was the boatswain present?

A. Well, not that I know of, sir.

Q. Were loading operations going on at this time when you got back there?

A. Yes, loading operations were going on.

Q. On what side of the ship were the loading operations?

A. The port side.

Q. The side moored to the dock, is that right?

A. Yes, sir. [32]

Q. All right, then. What transpired when you started to move these cans?

A. Well, he took the first can and went up on the bulwark, what I call the bulwark, the rail on the starboard side.

The Court: You will have to speak loudly enough so everybody in the courtroom can hear you.

A. Yes, sir.

The Court: Raise your voice a little bit.

(Testimony of Theodore F. Bovich.)

A. Well, Mr. Kazem-Beck, he preceded me with the first can.

Q. Who?

A. Kazem-Beck, the other able-bodied seaman.

Q. Mr. Kazem-Beck? Have we had him on the stand?

Mr. Reynolds: Yes, your Honor, the last witness.

The Court: Go ahead.

A. He proceeded on the starboard side of this rail and almost got to his destination with this can, and he slipped some way, causing the can to fall overside into the water. He fell on the inside and kind of bruised his leg a little. I kind of laughed about it. I said to myself——

Mr. Hoge: I object to what he said to himself, your Honor.

The Court: Yes, yes. That is not proper evidence.

Q. (By Mr. Reynolds): Merely state what you did.

A. So I went back to get another can, and went between these two boxes where the passageway was.

The Court: Well, you saw this Mr. Kazem-Beck, you saw him slip? A. Yes, sir.

Q. You saw the can go over?

A. Yes, sir.

Q. Then it came your turn to take a can, is that it? A. I had a can, following him.

Q. Well, you had a can. He had a can first. He preceded you? A. I preceded him, sir.

(Testimony of Theodore F. Bovich.)

Q. No. Did you come first? A. No, sir.

Q. You followed him, did you?

A. Yes, sir.

Q. All right. You saw him slip, you saw him take the can, saw him try to move it, saw him slip, saw the can go overboard. Then you took your can?

A. No, I had completed with this one particular can I had.

The Court: I don't know. You will have to go ahead, Mr. Reynolds. Begin at the beginning.

Q. (By Mr. Reynolds): All right. You saw Mr. Kazem-Beck slip when he tried to——

The Court: Who slipped?

A. Kazem-Beck.

The Court: Don't lead him. Go ahead.

Q. (By Mr. Reynolds): What did you do?

A. I went back to get the next can. I went through this passageway.

The Court: He had gone before that? [34]

A. Yes, sir.

Q. Well, now, let's see. Who was the first one to take a can and move it, according to orders?

A. Well, he took the first can, sir. Then I followed him with another one. As he slipped and fell, I still was coming in back of him with mine, my can, and I put it down, and he sat down to look at his leg. So I went back to get another can, and came through this passageway. I got in there and they had lifted another box onto the boom. They were swinging one over and hit this box on No. 4

(Testimony of Theodore F. Bovich.)

Hatch, causing it to come over and hit my leg, caught my leg between the can and the box.

Q. (By Mr. Reynolds): Where was the can at the time the box pushed over against you?

A. It was between my leg.

Q. Which way were you facing?

A. I was going backwards.

Q. Backwards, and did you have the can above the deck?

A. Well, it was above the deck, yes, sir.

Q. Were you carrying it or dragging it?

A. Dragging it.

Q. You were backing up, dragging this can?

A. Yes, sir.

Q. And were between the two crates?

A. Yes.

Q. What was the distance separating these two crates you were passing through at that time?

A. I would say three, or three and one-half feet.

Q. All right. After this crate was pushed up against you, [35] what happened?

A. Well, I hollered. I hollered for some help.

Q. What part of your leg was caught, if you know?

A. Just above the ankle, here, what I could see of it.

Q. What was it caught by?

A. This box and the garbage can.

Q. Between the box and the garbage can?

A. Yes, sir.

(Testimony of Theodore F. Bovich.)

Q. How were you finally removed from your position?

A. They finally got this box up off my leg. A couple of other fellows assisted me, laid me over on a cot there, put a bandage on my leg and took me to the hospital.

Q. What hospital were you taken to?

A. 248 General Hospital, Oro Bay, New Guinea.

Q. About how long did you remain there in the hospital?

A. About two and one-half months.

Q. What injuries did you have, if you know?

A. According to what the doctors said, fracture, compound, complete.

Q. Was there any other damage to your leg?

A. A punctured artery.

Q. Anything you could see, was the skin broken and lacerated?

A. Yes, sir.

Q. After this hospital, where did you go?

A. They transferred me to the No. 4 General Hospital at Finchhaven. [36]

Q. How long were you there?

A. About a month and a half.

Q. During this time, did you have your leg in a cast?

A. Well, I had my leg in a cast about a week before I left the first hospital, No. 248 General.

Q. What kind of treatment did they give you at the first hospital?

A. Well, they gave me penicillin. They were giving me penicillin and taking me to the operating room, the surgery room, and dressing my leg every day.

(Testimony of Theodore F. Bovich.)

Q. I mean, did they operate on your leg?

A. Yes, sir.

Q. And set the bone, is that right?

A. Yes, sir.

Q. All right, after you spent this additional time in the hospital, where were you moved?

A. Well, I came out on a transport ship and arrived in San Francisco on May 22, I believe it was, and I went to the Marine Hospital the following day and I have been an out-patient there.

Q. What was the condition of your leg at that time? A. It was draining.

Q. You had some kind of sore or ulcer on it?

A. Ulcer. That is what they called it, ulcer.

Q. How long did you remain an out-patient at that hospital?

A. Until March 6th of this year.

Q. When you left the hospital on March 6th, were you given a certificate of hospital out-patient treatment? A. Yes, sir.

Q. Is this the certificate you were furnished?

A. Yes, sir. [37]

Mr. Reynolds: I will introduce this in evidence as the Libelant's Exhibit 1.

LIBELANT'S EXHIBIT No. 1

Given to Patient

Certificate of Hospital and Outpatient Treatment

U. S. Marine Hospital, San Francisco, Calif.

Date: March 6, 1946.

1. Name of patient, Bovich, Theodore F.

(Testimony of Theodore F. Bovich.)

2. Brief abstract of patient's statement as to how and when disability was incurred. Patient states he suffered compound fracture Jan. 3, 1945.
3. Diagnosis. Compound fracture, right ankle (old).
7. Date of admission to outpatient department. May 23, 1945.
8. Date of discharge from outpatient department. Mar. 6, 1946.
9. Condition on discharge. Fit for duty out of tropics.
10. Number of days completely disabled, May 23, 1945, to Mar. 6, 1946.
12. Prognosis. Fair.

[Seal] /s/ WM. Y. HOLLINGSWORTH,
Medical Director.
Medical Officer in Charge.

ak

N. B.—This certificate is furnished to the patient to enable him to collect insurance benefits that may be due him and is to take the place of the certificate required by the insurance companies from private physicians who attend persons insured. It is compiled from the official records of the hospital and is signed by a medical officer of the United States Government over his official title.

[Endorsed]: Filed May 8, 1947.

(Testimony of Theodore F. Bovich.)

Q. This indicates the number of days completely disabled, May 23, 1945, to March 6, 1946. Is that correct? A. That is right.

Q. It also states "Fit for duty outside of tropics." A. Yes, sir.

The Court: It may be admitted.

The Clerk: The exhibit is marked Libelant's Exhibit No. 1.

(The document referred to was marked Libelant's Exhibit No. 1.)

Q. (By Mr. Reynolds): Mr. Bovich, during the time that you were serving aboard the Charles J. Colden, what were your average monthly earnings?

A. Approximately \$360.00 a month.

Q. Did the amount which you have stated include your board and room? A. No, sir.

Q. That was furnished you in addition to this amount you were paid? A. Yes.

Q. Did you receive a seaman's wage account which indicated your earnings from October 11, 1944, to January 3, 1945? A. Yes, sir.

Q. Is this that account? A. Yes, sir.

Q. Did you further receive a seaman's wage account covering [38] the period January 4, 1945, to March 23, 1945? A. Yes, sir.

Q. Is that the account? A. Yes, sir.

Mr. Reynolds: I will offer to introduce this as Libelant's Exhibit No. 2.

The Court: Admitted.

11620 Filed OCT 1 1946

U. S. Citizenship, Clerk

UNITED STATES OF AMERICA
WAR SHIPPING ADMINISTRATION
SHEPARD STEAMSHIP CO., GENERAL AGENTS

By Edward G. Dutcher
Deputy Clerk

Resident Alien
Non-Resident Alien
W4 Status A-1

SEAMAN'S WAGE ACCOUNT

S/A Charles J. Gorden Voy Two Port Oro Bay - New Guinea Date Jan. 3, 1944
Name Porvoh J. Theodore Rating A B Social Security No. 557-18-1954
Last Middle First
Address 714 32nd St., Oakland California City State

EARNINGS:

	From	Date	To	Mon.	Days	Rate	Per Mo.
1. WAGES	10/22/44	10/23/44	10/24/44	2	24	@ 100.00	280 00
2. WAR BONUS	33-2/3	10/24/44	10/26/44	3	-	@ 100.00	4 00
	66-2/3	10/27/44	10/29/44	23	-	@ 80.00	34 67
	100%	10/30/44	1/3/45	2	5	@ 100.00	216 67
3. AREA BONUS	10/30/44	1/3/45	1/3/45	66	-	@ 5.00	330 00
4. PENALTY CARGO AND/OR EMPLOYEE BONUS	-	-	-	-	-	-	-
5. PORT ATTACH BONUS	-	-	-	-	-	-	-
6. OVERTIME	122 1/2	Hours @ .85	per Hr.	-	-	Sec. Watches @ -	-
7. MEAL ALLOWANCE ABOARD	-	Days @ 1	per day	-	-	-	-
8. ROOM ALLOWANCE ABOARD	-	Days @ 1	per day	-	-	-	-
9. TOTAL EARNINGS (Lines 1 to 8)	-	-	-	-	-	-	1041 33
	-	-	-	-	-	-	969 67

DEDUCTIONS:

10. WITHHOLDING TAX (Show No. 8 lines 7 and 8)	Days @ .25	358 00	612 47	@ 20%	122 49
11. SOCIAL SECURITY TAX (Show No. 8 lines 7 and 8)	Days @ 1.28	100 80	1070 37	@ 1%	10 70
12. ALLOTMENTS (Nov., Dec., Jan.) @ \$90.00	-	-	-	-	278 00
13. ADVANCES	-	-	-	-	106 44
14. SLOPS	-	-	-	-	16 34
15. FINES	-	-	-	-	-
16. TOTAL DEDUCTIONS	-	-	-	-	926 37
17. BALANCE DUE	-	-	-	-	443 10

I CERTIFY THAT THIS PAYROLL VOUCHER IS TRUE AND CORRECT; THAT THE PERSON MAKING THIS STATEMENT IS THE PERSON WHOSE NAME APPEARS ON THE VOUCHER; AND THAT THE PERSON WHOSE NAME APPEARS ON THE VOUCHER IS ENTITLED TO THE AMOUNT OF PAY STATED ABOVE.

Edward G. Dutcher (Master)

Payroll books are in accordance with the above

Certified as Correct

Received Payment in Full

(Payee)

No.

UNITED STATES OF AMERICA
WAR SHIPPING ADMINISTRATION
SHEPARD STEAMSHIP CO., GENERAL AGENTS

Resident Alien
Non-Resident Alien
W-4 Status

SEAMAN'S WAGE ACCOUNT

S/A **CHARLES J. COLDE**Voy **2** Port **San Francisco**Date **Mar 28, 1945**Name **Beviah**

Y

First

Rating

A.B.

Social

Security No. **577-18-1954**Address **2828 Chestnut Street,**City **Oakland**State **California**

EARNINGS:

	From	Date	To	Date	Mon.	Days	Rate		TOTAL
1. WAGES		1/4/45	3/23/45	2	20	@	100.00	Per Mo.	265 67
2. WAR BONUS	33 1/3%	5/20/45	5/22/45	3	"	"	40.00	"	4 00
	66 2/3%	5/12/45	6/19/45	8	"	"	80.00	"	21 33
	100 %	5/27/45	5/12/45	8 7	"	"	100.00	"	23 33
3. AREA BONUS		5/27/45	5/13/45	8	"	"	5.00	Per Day	40 00
4. PENALTY CARGO AND/OR EXPLOSIVE BONUS									
5. PORT ATTACK BONUS									
6. OVERTIME									
7. MEAL ALLOWANCE ASHORE									
8. ROOM ALLOWANCE ASHORE									
9. TOTAL EARNINGS (Lines 1 to 8)									355 33

DEDUCTIONS:

10. WITHHOLDING TAX (Lines No. 8 less 7 and 8)	Less Exemptions 72	Days @	\$	355.33	@	20%	7 90
11. SOCIAL SEC. TAX (Lines No. 8 less 7 and 8)	Plus Board & Log	Days @	\$	355.33	@	1%	3 55
12. ALLOTMENTS							
13. ADVANCES							
14. SLOPS							
15. FINES							
16. TOTAL DEDUCTIONS							11 45
17. BALANCE DUE							\$ 343.88

I CERTIFY THAT THIS PAYROLL VOUCHER IS TRUE AND CORRECT; THAT THE PERSON NAMED HEREON WAS EMPLOYED BY THE UNITED STATES OF AMERICA DURING THE PERIOD AS STATED ABOVE; AND THAT THE PERSON WHOSE NAME APPEARS ON THIS PAYROLL VOUCHER IS ENTITLED TO THE AMOUNT OF PAY STATED ABOVE.

Paid in full before use in accordance with the above

Master)

Received Payment in Full

Thos F. Beavish
Certified as Correct

(Payee)

The Clerk: The exhibit is marked Libellant's Exhibit No. 2.

(The document referred to was marked Libellant's Exhibit No. 2.)

Q. (By Mr. Reynolds): From the time you were an out-patient on the 23rd day of May, 1945, until you finally returned to work, were you compelled to maintain yourself? A. Yes, sir.

Q. Do you know approximately what it cost you to maintain yourself during that period of time? A. Approximately——

Mr. Hoge: Your Honor, I think that is incompetent, irrelevant and immaterial. The amount of maintenance universally allowed is \$3.50 a day.

Mr. Reynolds: I will be willing to stipulate to that.

The Court: Very well.

Q. (By Mr. Reynolds): Mr. Bovich, after you finally left the Marine Hospital, when did you return to work?

A. Well, after I was out of the Marine Hospital, got a discharge there, my wife and mother-in-law, we went to pick some grapes at Mrs. Anderson's ranch, to more or less give my [39] leg a test. The doctor told me to try some light work. So, when I picked these grapes for about four days, and the boxes were too heavy for my leg, so I went back to the Marine Hospital again and got my bandage removed. I told the doctor the particular work I was doing, and told him the approximate weight of the boxes with the grapes. He told me to take it a little easier, then.

(Testimony of Theodore F. Bovich.)

Q. He advised you to do light work, is that it?

A. Yes, sir.

Q. When did you finally return to work at your former job? A. About three weeks ago, sir.

Q. What type of work is that you do?

A. Acetylene burner.

Q. How long had you done that type of work before you went into the Merchant Marine?

A. Roughly, about two and one-half years.

Q. Now, could you just describe for the Court the present condition of your leg?

A. Well, right now, when I do any considerable amount of walking, my leg seems to tighten up on me, seems like it is swollen, is tightening, more or less.

The Court: Where is the break, below your knee? A. Right here.

Mr. Reynolds: Just pull up your pants there, and indicate it.

The Court: You say, when you walk. What do you mean?

A. I mean any considerable amount of walking I do. [40]

Q. You mean the leg will swell?

A. It seems that way, sir. But it tightens on me, gets tight, then I cannot bend my toes fully, and it is pretty sensitive around that punctured artery.

Q. Does it make you lame, make your leg heavy?

A. Tightens.

Q. What do you mean, tightens?

(Testimony of Theodore F. Bovich.)

A. It feels like it is swollen, gets tight.

Q. Is it really swollen?

A. I don't know if it is swollen, sir, it gets tight on me.

Q. Does it pain you?

A. Yes, sir, not very much, though.

Q. But you are conscious of it? A. Yes.

Q. If you sit down and take a rest, I suppose that helps it?

A. It helps it, but I found out in this particular job I have, when I come home in the evenings, I kind of have a throb.

Q. In the leg? A. Yes.

Q. Where is the throb?

A. Right near the toes where it feels tight.

Q. No throbbing up to the knee?

A. No, sir. If I try to run, that muscle back here, when I move, even do that, it causes that punctured artery to feel like something is pinching it.

Q. No pain?

A. If I try to run, it does.

Q. How old are you?

A. Twenty-seven, sir.

Q. (By Mr. Reynolds): On your present job, what type of work do you have to do? Just describe your activities a little bit. [41]

A. Well, according to wherever the place is, so I have to climb the ship. I have difficulty climbing.

The Court: Are you on a ship now?

A. I work for the American Ship Wrecking

(Testimony of Theodore F. Bovich.)

Company, cutting these old ships up for scrap, and I find it pretty difficult to go up steep steps. So I go sideways because I haven't the full motion of my leg right here, today, yet.

Q. Well, but you go up all right?

A. Yes, sir.

Q. (By Mr. Reynolds): Then you are conscious of this leg during the time you are working, is that right? A. Yes, sir.

Q. Now, did you receive some maintenance from either the War Shipping Administration or the company, after you were an out-patient at the Marine Hospital, did you not? A. Yes, sir.

Q. Can you recall approximately the period of time over which you were paid this maintenance?

A. I don't remember that, sir.

Q. Can you remember about the last time you got a maintenance check?

The Court: Do you remember how much you received?

A. I believe I received a little better than \$400 the entire time. I don't remember when was the last check I received.

Mr. Reynolds: Do you have those figures, Mr. Hoge? Anything you have, I am willing to stipulate to.

Mr. Hoge: I have some receipts here. I have a receipt here for \$932.83 maintenance, your Honor.

Mr. Reynolds: Maintenance, or maintenance and wages?

Mr. Hoge: Maintenance. It totals \$355. He has been paid maintenance right up until this date.

(Testimony of Theodore F. Bovich.)

Mr. Reynolds: No, it will be stipulated that the Libelant was paid his maintenance until December 18, 1945.

Mr. Hoge: December 18th, yes.

Mr. Reynolds: And I am willing to stipulate further that he received his unearned wages up until the end of the voyage.

The Court: What?

Mr. Reynolds: Which ended on the 23rd of March, 1945. So, that the only claim for maintenance would be from December 18, 1945.

The Court: To March 6, isn't it?

A. Yes, sir.

Mr. Reynolds: Well, maintenance until he returns to work.

Mr. Hoge: 78 days. He was discharged, able to return to work, work outside of the tropics, on March 6, which would make 76 days additional maintenance.

Mr. Reynolds: That is a question for the Court to determine.

The Court: I know, but if maintenance is due, will you gentlemen agree how much is due, if it is due.

Mr. Hoge: \$3.50 a day. [43]

The Court: From December 18?

Mr. Hoge: December 18, 1945, to March 6, 1946, your Honor.

Mr. Reynolds: We are in agreement on it that far, your Honor.

The Court: What?

(Testimony of Theodore F. Bovich.)

Mr. Reynolds: We are in agreement on it that far, but the Libelant was not able to return to work at that time, so we are claiming maintenance until he is able to return to work.

The Court: Well, when was that?

The Witness: In September, sir.

Q. (By Mr. Reynolds): What date did you return to work?

A. The latter part of September.

Mr. Hoge: Your Honor, here is the Libelant's Exhibit. It says "Fit for duty outside of tropics, March 6, 1946."

The Court: Go ahead.

Q. (By Mr. Reynolds): What is the name of the company for which you are working at the present time?

A. The American Ship Wrecking Company.

Q. About how long have you been working there?

A. Oh, now I have been working there about ten days.

Q. Did you work for any other concern before you went to work for the American Ship Wrecking Company?

A. Yes, sir.

Q. What is the name of that company? [44]

A. The General Engineering Company.

Q. What type of work were you doing there?

A. That was the same type of work.

Q. And what was the date you started to work there?

A. That was in September some time.

Q. September of 1946?

(Testimony of Theodore F. Bovich.)

A. Yes, sir. I worked there for about four days, then I got laid off.

Q. And prior to that time the only work you did between May of 1946 and September of 1946, was the grape picking for about four days. Is that right?

A. Yes, sir.

Mr. Reynolds: I think that is all.

Cross-Examination

By Mr. Hoge:

Q. Mr. Bovich, this loading operation that was being performed at the time, was being done by the Army stevedores, was it not?

A. Yes, sir.

Q. And the Army stevedores were handling the winches, and, of course, handling the loading and unloading gear of the ship?

A. As far as I know, sir.

Q. You say you are an able-bodied seaman?

A. Yes, sir.

Q. And as such you have been taught, and it is one of the duties of an able-bodied seaman, to keep from placing himself underneath a load when it is going over the deck. Is that right?

A. I was not under the load, sir.

Mr. Reynolds: I object to that question. [45]

The Court: The objection is overruled. Answer the question.

A. I was not under the load, sir.

The Court: Oh, no. Can't you answer the ques-

(Testimony of Theodore F. Bovich.)

tion? You were not asked whether you were under the load or not. Read the question.

(Question read by the Reporter.)

The Court: Yes or no.

A. Yes, sir.

The Court: Now, if you wish to explain that, you may. You said you were not underneath the load.

A. Yes. That is what I understood him to say.

Q. (By Mr. Hoge): Mr. Bovich, when a ship is being loaded or unloaded, the booms are not in use at all times, are they?

A. Well, it is according——

The Court: Will you answer the question, please.

A. Yes, sir.

The Court: If you answer the question, if you wish to explain your answer, you may.

Q. (By Mr. Hoge): Now, as you say, the booms were not always in use, the gear was not being used constantly. Is that right? Put it this way: For instance take the boom it is loading crates, the boom will move over and there will be some period of time there during which they are fastening the slings around the crate so that it can be raised. Is [46] that right? A. Yes, sir.

Q. During that time the boom is not being moved?

A. Not that particular moment, no, sir.

Q. After they get the sling around the crate, then with the use of the boom they will raise it, carry it over to the point where they can let it down.

A. Yes, sir.

(Testimony of Theodore F. Bovich.)

Q. And after the thing has been let down, the boom remains motionless for some period of time until they can get the sling off of it, isn't that right?

A. That is right.

Q. And, as you testified, I believe, and your witness here, you received orders to take these empty garbage cans and carry them to some part of the ship there.

A. Yes, sir.

Q. You were not told how to do it, by what route to go, were you?

A. No, sir.

Q. Now, regarding your injury, prior to your going to sea, and incidentally since December 7, 1941, was when you went to sea first, wasn't it?

A. 1942, sir.

Q. Your regular occupation is that of an acetylene torch operator, isn't it?

A. Yes, sir.

Q. You had done that, you had taken that up as a trade before, had you not, Mr. Bovich?

A. Yes, sir.

Q. Now, some time after you were certified by the Marine Hospital as able to resume work outside of the tropics, you took a job with the General Engineering Company, did you not?

A. Yes, sir. [47]

Q. The General Engineering Company is a ship and drydock company, some such name?

A. Yes, sir.

Q. You worked there until such time arrived that they had no further work for you?

A. Yes.

Q. And after that you took up employment with this concern you are with now, that is, the American Shipwrecking Company.

A. Yes, sir.

(Testimony of Theodore F. Bovich.)

Q. And you started to work for them when, in September?

A. I believe that is when it was, the latter part of September or early October.

Q. You are still working for them, are you not?

A. Yes, sir.

Q. Performing the duties of an acetylene burner? A. Yes, sir.

Q. You are being paid \$360 per month for doing that work, are you not? A. No, sir.

Q. What are you being paid?

The Court: Read the question.

(Question read by the Reporter.)

A. \$1.45 an hour, sir.

Q. (Mr. Hoge): Do you remember your deposition having been taken by Mr. Schaldach, the gentleman sitting at the trial table back there, on September 30, 1946? A. Yes, sir.

Q. I will just ask you to read from the top of page 15, line 1, down to line 5 of your deposition.

Mr. Hoge: Shall I hand it to the witness? [48]

The Court: Yes, please.

Mr. Hoge: Just read it to yourself.

A. From line 11, you say?

Q. Line 1 to line 11, Mr. Bovich. Did you read that? A. Yes.

Q. Could you explain if there is some misunderstanding there? What did you mean by \$360 a month, including room and board?

A. I did not quite understand the room and

(Testimony of Theodore F. Bovich.)

board. I did not know if that was included, or otherwise, until I thought for a moment.

Q. On this American Shipwrecking Company?

A. No, sir. That concerns the ship, doesn't it?

Q. That is what I want to find out. I will read it, if there is a misunderstanding:

“Mr. Reynolds: Just a minute. You said \$360. That is \$360 a month?

“Mr. Schaldach: I said a day. That is \$360 including room and board? A. Yes.”

Now, did you refer to that on the ship when you had your accident, or was that with this American Shipwrecking Company?

A. That was on the ship when I had the accident.

Q. Go back to page 14, line 18:

“Q. Where are you working now?

“A. American Shipwrecking Company. [49]

“Q. Since what date have you been working there? A. About eight or nine days.

“Q. What was your average monthly wage while you were on the——”

What is the name of the ship you were on?

A. The Charles J. Colden.

Q. That \$360 meant the wages you were paid while aboard the ship, then? A. Yes, sir.

Q. And in this occupation of yours as an acetylene torch welder you do welding, cut steel and all that, don't you? A. Yes, sir.

Q. You earn \$1.45 an hour? A. Yes, sir.

Q. You are paid \$10.60 a day?

(Testimony of Theodore F. Bovich.)

A. Approximately that.

Q. And your salary would be around \$240, or \$250 a month? A. Yes, sir.

Q. Now, this \$360 that you mentioned you were earning was the amount of your pay including the War Bonus, was it not? A. Yes, sir.

Q. Now, in August, after V-J Day, the Government terminated that, did it not, the War Shipping Administration? A. Yes, sir.

Q. And you received \$100 a month with room and board, and then it was in September or October they increased that to \$145, did they not?

A. Well, I don't know what their agreements were. [50]

Q. But you do know it was terminated, this bonus, around August after V-J Day?

A. Yes.

Mr. Hoge: That is all. No further questions.

Mr. Reynolds: That is all.

The Court: That is all.

(Witness excused.)

Mr. Reynolds: If it please the Court, the only other witness we were going to call is the doctor. I did not anticipate we would finish quite so soon. I have him scheduled to appear at 2:00 o'clock.

The Court: Why do you want a doctor?

Mr. Reynolds: There are some injuries, if it please the Court, that are not clear to the eye. I mean, there was an operation that was performed; there is still a screw in his leg that he could not

testify to, which would have to be shown by X-rays, and I believe would be helpful.

The Court: I don't see how it would be material here. I don't think there is sufficient evidence here to establish negligence.

Mr. Reynolds: Well, if it please the Court, of course——

The Court: I don't see it at all. I can see he is entitled to maintenance and cure. The question is, how much. He may be entitled to some maintenance and cure. Right up to this moment I cannot see where negligence has been established. [51]

Mr. Reynolds: If it please the Court, the Libellant was working on a ship.

The Court: I know he was working on a ship.

Mr. Reynolds: He was carrying out orders.

The Court: Admitted.

Mr. Reynolds: He was placed in a dangerous position.

The Court: Moving garbage cans. I cannot see it at all, having in mind all of the testimony that has been adduced here. I tell you right now, Mr. Reynolds, I cannot see where you have established negligence.

Mr. Reynolds: If it please the Court——

The Court: Wherein you think you have. Now, just tell me.

Mr. Reynolds: Perhaps I could illustrate here a little with the board.

The Court: Yes. You have no further evidence except the doctor, have you?

Mr. Reynolds: No, your Honor.

The Court: His leg was broken. I guess there is no question about that. He was injured. There will be no further testimony on the question of negligence?

Mr. Hoge: None, your Honor, at all. We have the deposition.

The Court: You have a deposition you want to read?

Mr. Hoge: No, your Honor. I say, we have his deposition [52] in court.

Mr. Reynolds: If it please the Court, according to the testimony of the witnesses who appeared on the stand here, Mr. Bovich and Mr. Kazem-Beck were working at—this will be forward on No. 1 Hatch, when the boatswain ordered them to go to the rear of the ship to the No. 4 or No. 5 Hatch, and move some ash cans that were stowed back here, up to the hatch aft of the deck house, or the bridge house. At that time the ship was moored port side to, to the dock. The booms were over the side and loading operations were being conducted. The mate and the boatswain knew those operations were going on at the time when they sent these two men back here to move these cans.

The Court: Empty cans.

Mr. Reynolds: Empty cans.

The Court: Empty cans.

Mr. Reynolds: At that time there arrived, there were these two large crates in this particular area, which is the starboard side of No. 4 Hatch. There was other gear stowed on the ship.

The Court: Other what?

Mr. Reynolds: Other gear, and this passageway was obstructed.

The Court: I have not heard anything about any passageway being obstructed. [53]

Mr. Reynolds: Yes, your Honor. That is the whole point. These crates were right in the passageway and obstructed this movement of these cans.

The Court: Well, they could lift them up. They were empty cans. It is in evidence here that they could have been lifted up and passed over.

Mr. Reynolds: Yes, your Honor. They had to pass between the crates to get on the other side. These crates were six to eight feet high. While the Libelant was passing between these crates, following out orders, another crate being swung aboard struck this crate on the port side, pushed it against him, crushing his leg. There was nothing he could have done to prevent the accident; no other passage he could have used. The loading operations were being conducted on the port side of the ship, swinging cargo aboard. It is a rudiment of good seamanship that a man will not work on the side of a ship where there is loading. There was nothing to give them warning that loading was being conducted on this side; there was no other passage they could use. Mr. Kazem-Beck attempted to go along the bulwark; he slipped; he was unsuccessful in going by that way, he dropped the can over-side. Mr. Bovich, the Libelant, walked between the crates and it was clearly negligence in swinging the third crate over and striking the other crate.

In the first place it was negligence in sending a

man [54] back there where the boatswain and the mate knew they would have to go through the narrow passageway while loading operations were being conducted. In that way they failed in their duty to furnish a safe place to work and gave a negligent order. There was no supervision of the work by any ship's officers, or by the boatswain at this time, when they knew loading operations were going on. They knew there were things going to be placed and when.

The Court: Who was the boatswain?

Mr. Reynolds: The boatswain's name was Malone.

The Court: The boatswain has not appeared here at all.

Mr. Reynolds: No, sir, the boatswain remained away on the forward part of the ship. None of the ship's officers were present at the time the accident occurred. I think under those circumstances, if it please the Court, I could produce numerous authorities that will show that the owner and operator of the ship was negligent in their duty toward the seamen under the Jones Act, the Employers Liability Act. There is a much greater duty imposed upon the employer than there is in the ordinary negligence case.

The Court: I don't think so. There is nothing in that statement at all. The same rule, no, no, no, the same rule of negligence would apply under the Jones Act as in any other suit for negligence. Of course, in all these cases, we have, of course, the rule which we all recognize, that a seaman is [55]

a ward of the court, and he must receive the protection of the court, and the Court of course is always more liberal toward seamen than toward any other litigants I know of. In this court we try to protect them. I don't know as we serve him. We hope to be fair to all litigants, but I always have in the back of my head, when I am trying these cases, that the seaman is a ward of the court; he is to receive the tender protection of the court, the solicitous protection of the court. We always try to do that. But, having all those things in mind, Mr. Reynolds, I do not see any evidence, or sufficient evidence in any sense of the word to support the claim here of negligence. Now, of course I may be wrong.

Mr. Reynolds: If it please the Court, I sincerely believe there is the act of the Army stevedores in swinging this huge crate over, negligently striking the crate where the man is working, was clearly negligent, and the operator of the ship would also be responsible for the control of loading that cargo, and I believe there is a very recent case decided in the Washington District that stated the operator and employer in that case would be responsible for the negligence of an Army stevedore.

The Court: Yes, well, where is the negligence? They were loading, they were actually busy on this ship, it was wartime, wasn't it?

Mr. Reynolds: Yes, your Honor. [56]

The Court: Yes.

Mr. Reynolds: But they still had time to bring in the garbage scows, and they had regulations.

The Court: But the garbage had been emptied off the ship, because the cans were empty, the garbage had been dumped. These men were ordered to move empty cans.

Mr. Reynolds: That is correct, your Honor.

The Court: Yes.

Mr. Reynolds: That is why it was unnecessary to do that.

The Court: Unnecessary to move the empty cans or what?

Mr. Reynolds: Unnecessary to move the empty cans at that time and place them in this position where they were loading.

The Court: How do we know when the proper time was to move the cans? If the cans were empty, probably they had a station on the ship to which the boatswain or someone on the ship in authority thought the cans should be moved, placed in their stations where they were before. Now, an order was given to do that sort of thing and something happened. Where is the testimony to show there was any negligence here?

Mr. Reynolds: Well, your Honor, you might take the example of an automobile accident. Suppose a person is [57] standing behind a box and someone negligently drove an automobile into that box and injured them.

The Court: Where?

Mr. Reynolds: Any place. There would be negligence.

The Court: Any place. That is so uncertain. Any place does not mean anything. That don't

help at all. Oh, no, there has to be some proof of negligence. We just cannot guess at negligence. There must be some proof of negligence. Now, where was the negligence? Was it the negligence of the boatswain, or somebody on the ship, to say to the men on the ship, "Move those cans back, or put them some place on the ship?" Was there any negligence in that?

Mr. Reynolds: Yes, there was, your Honor, when they sent these men back where they were swinging two-ton crates around, to move them at that time.

The Court: What two-ton crates? I don't know what you are talking about.

Mr. Reynolds: Well, these two crates through which they were required to pass were two-ton, the crate that was struck.

The Court: You say that very definitely. I don't remember testimony as definite as that. You say that definitely because that is your theory in the case. Has that thing been proven?

Mr. Reynolds: Mr. Kazem-Beck testified to that, that [58] there were tractors or tanks in these crates or boxes. That required the large boom to move the crate and get it off of Mr. Bovich's leg after the accident occurred. He was not able to do it with this large stanchion. These were dangerous operations being performed there at that time that these men were sent back there.

The Court: All right, that may be true, but I don't see the connection here. I don't see the connection here. That is to say, I cannot see it so

clearly as you do, that the testimony establishes the charge that there was negligence. He was injured, yes; he was hurt on the boat. There is no question of it. I think he is entitled to maintenance and cure to some extent. I cannot see sufficient proof of negligence.

Mr. Reynolds: If it please the Court, there were the primary duties of the employer and the operator of the ship to furnish seamen a safe place to work.

The Court: Yes, I know, a safe place to work. I have heard that so often. It has been dinned into our ears. We know it above all things. At the same time, you have to establish a case to the satisfaction of the Court that negligence has been established. Now, I don't think it has been established; I don't think it has.

Mr. Reynolds: I believe, respectfully, your Honor, that the evidence shows they did not furnish them with a safe [59] place to work.

The Court: He was hurt, therefore he did not have a safe place to work. Now, you have to prove that by the testimony, and you have to prove it by reputable testimony, testimony worthy of credence, testimony that is substantial and satisfactory to the Court or a jury. Now, I say to you that my judgment here is, as far as I heard the testimony, that you have not established negligence. There is no question but what this man was injured, and he was seriously injured. Now, I think he would be entitled to maintenance; how much, I don't know. That will appear in time. I don't question that he was

injured and seriously injured, but through the negligence of the ship, I don't know. [60]

Mr. Reynolds: I believe through the negligence of the stevedores——

The Court: No, there is no evidence to support that at all, that I see.

Mr. Reynolds: In swinging this huge crate over and striking the other crate.

The Court: He was hit by a crate, all that sort of thing by loading going on, but that does not establish negligence. Do you mean they would have to stop all activity on the ship for a couple of sailors to move empty garbage cans? That is absurd that all work must stop on the ship until these men move a couple of garbage cans. [60] That cannot [Balance of sentence omitted in copy.]

Mr. Reynolds: I agree with you.

The Court: That being so, you have to establish under all the rules of evidence the fact that there has been negligence. My state of mind right now is that you have not established negligence. I say the man was hurt, he was seriously hurt; he is entitled to maintenance and cure, entitled to it. I cannot see that you have established negligence which would entitle you to damages.

Mr. Reynolds: It is not the contention that loading operations must cease. It is the contention that this was an unnecessary bit of work, not necessary to be performed.

The Court: You must establish negligence.

Mr. Reynolds: Yes, your Honor.

The Court: I have given you my state of mind.

I don't think that you have established negligence. I may be in error on that.

Mr. Reynolds: Would you care for me to submit a memorandum?

The Court: What for, to argue the facts?

Mr. Reynolds: No, to argue the law.

The Court: No, you know the law; I hope I do. I can give you the definition of negligence. I have been trying cases of negligence many, many years. I can give you the definition of negligence as we find it in the law, as I give it to the juries every time I try one of these negligence [61] cases with a jury, but you have not established negligence. He was hurt, he was seriously injured, there is no question of it, but I cannot see the negligence. That is, I don't think your testimony is sufficient to establish negligence. That is my thought about it.

Now, it is five minutes to 12:00. I am going to continue this matter to 2:00 o'clock. If you want to take it up further, you can take it up further. If you have some other testimony you want to put in, I will hear it at that time. As far as the doctor's testimony, I cannot see that I want to hear anything about that.

Mr. Reynolds: All right, your Honor.

The Court: Unless you feel it would be helpful or impressive. He had a serious break of his leg, did he not. You admit that, don't you?

Mr. Hoge: Yes, not permanent, but serious.

The Court: Well, he had a serious fracture. If you feel you want to put the doctor on on that question——

Mr. Reynolds: Yes, your Honor. Well, there is a contention to the effect that he was unable to work for a period of time after he was discharged from the Marine Hospital, and he would be entitled to maintenance during that time until he returned to work. Perhaps you would like the doctor's testimony on that point.

The Court: Well, the doctor is going to be here at 2:00? [62]

Mr. Reynolds: Yes, your Honor.

The Court: Well, put him on the stand and we will discuss this matter further.

Mr. Reynolds: Yes.

The Court: I am not foreclosing you now, even on the negligence. I mean, if you have got something that can show it, as far as my state of mind is concerned, I think I could change it, but I cannot see it now. Now, of course, Mr. Hoge, I don't want you to go astray on this thing. If you think I am in error on this thing, I would rather be put right. You are representing the Government, are you not?

Mr. Hoge: Do you want me to make a statement?

The Court: I say, you are representing the Government?

Mr. Hoge: Yes. I think he has a claim for maintenance and cure, certainly not a claim for negligence.

The Court: That is my thought about it.

Mr. Hoge: For instance, these men are all 21 years of age and over, they are experienced seamen.

They were not told how to go to a particular place, what method of doing it. It was a case of some empty garbage cans there; the boatswain told them to take them somewhere. They knew loading operations were going on by the United States Army. They knew that from time to time loads would be brought across there, and Mr. Kazem-Beck, the witness here, said he did not want to take the chance of going in where this man Bovich went. There is no negligence there at all. True, as you say, they are entitled to maintenance and cure.

The Court: There is always a risk in working about a ship. Seamen know that.

Mr. Reynolds: Which is not assumed by the seamen, your Honor.

The Court: But there is always the risk of the sea; there is always that risk.

Mr. Reynolds: They were not at sea, your Honor.

The Court: They were in a dangerous occupation, men who are on ship. We all recognize it.

Mr. Reynolds: That is why care should be taken to protect them, your Honor, by the officers.

The Court: Well, you have got to show your negligence just the same. They take these risks; they are bound to take these risks. Any step they take on shipboard, they take a risk.

Mr. Hoge: That is why they are given maintenance and cure, your Honor.

The Court: And the protection they do. The seaman is offered unusual protection by the law and by the courts, but when it comes to the question

of negligence, you have got to prove negligence. You cannot assume it, you cannot just guess at it. You cannot say "Well, because you know we must be generous to the sailor, we must give you the benefit of [64] the doubt and say there is negligence". You cannot do that, because he was hit, because he was hurt, say there must be negligence. You cannot do that.

At any rate, I will continue it to 2:00 o'clock.

(Adjourned to 2:00 o'clock p.m. this date.)

Friday, October 18, 1946, 2:00 o'clock p.m.

The Court: The case of Theodore F. Bovich vs. United States, on trial.

Mr. Hoge: Ready, your Honor.

Mr. Reynolds: Ready. Call Dr. Eaves, please.

DR. JAMES EAVES

called as a witness on behalf of Libelant; sworn.

The Clerk: Doctor, will you state your name to the court? A. James Eaves.

Direct Examination

By Mr. Reynolds:

Q. Doctor, where do you maintain your office?

A. Medical Building, Nineteenth and Franklin, Oakland.

Q. How long have you been practicing in Oakland and the Bay area? A. Since 1914.

(Testimony of Dr. James Eaves.)

Q. Are you a duly qualified and licensed physician of the State of California? A. I am.

Q. And what was the medical school from which you graduated?

A. University of Edinburgh, Scotland.

Q. And could you give us the date?

A. 1910.

Q. Subsequent to your graduation from the University where did you practice?

A. From there I went to Oxford, and later to Guy's Hospital, London, and then I came to America, and then I taught at Stanford for a while, and then I entered [66] private practice.

Q. What type of instruction did you give at Stanford? A. General surgery.

Q. And you have been practicing then in the bay area since 1914, is that correct? A. Yes.

Q. Are you acquainted with the libelant, Theodore Bovich? A. I am.

Q. Have you had an occasion to examine him with reference to an injury that he sustained to his leg?

A. Yes, I first saw him August 3rd of 1945, and I have seen him subsequently several times since.

Q. Would you state the condition that you found existing at the time that you first examined him?

A. At the first visit he showed an ulcerated area on the lower part of the affected right leg, with an ulceration that wasn't completely healed, and he had limitation of motion at that time in his

(Testimony of Dr. James Eaves.)

ankle joint, and apparently had had an operation performed for a fracture of the lower third of his leg, in which, to retain the fragments, a metallic screw had been inserted.

Mr. Hoge: This was in August of 1945?

A. August of 1945, the 3rd of August when I saw him.

Q. (Mr. Reynolds): And the wound or the ulcerated area was still draining at that time?

A. At that time it was draining, a small area.

Q. Did you see him subsequent to that time?

A. I have on [67] several occasions.

Q. What was the last occasion upon which you saw him? A. 9/20/46.

Q. That would be September of 1946?

A. Yes.

Q. And would you just describe the condition of his leg at this time that you examined him in September?

A. The ulcerated area was well-healed. The scar resultant from the injury that he sustained on January 3rd of '45 was adherent to the underlying bone, and the main factor outside of the scar that he complained of was the inability to walk evenly up and down without pain, which he complained of going down the lower part of the—lower two-thirds of his leg to his toes.

Q. Would that be described as a limitation of motion?

A. To examine him without any infection, it was a bit difficult to tell what the situation was, so I

(Testimony of Dr. James Eaves.)

took further X-rays, what we call stereoscopic, because you could examine the *anxles*, right and left, and they were comparatively equal. Then this man spoke of the discomfort that he had going up and down stairs and he had to walk sidewise, he said, because of pain. And then I went on with further examination to determine the cause of that.

Q. In your further examination what did you determine was the cause of this, you might call it, voluntary limitation of motion?

A. The screw that was inserted to retain the fracture, as I can show by the X-ray, was penetrating through to the tendons [68] that supply the muscle—the tendons of the muscle that supply the toes were being impinged upon on certain active motions requiring, we will say, extension.

Q. Do you find any of the X-rays that show that pin? A. I have, yes.

Mr. Reynolds: I wonder if we might illustrate with those at this time.

Mr. Hoge: All right, sir.

Q. (Mr. Reynolds): These are the X-rays that were taken in September, '46, is that correct?

A. No, these are the ones taken 8/3/45, which show—taken in two views, and show this metallic screw here with an excellent alignment of the fractures, and good union of the bone, and no inflection around the screw. This is the side view showing the side view of the thing, showing the same thing there, but you do not see any infection around

(Testimony of Dr. James Eaves.)

the screw—good, firm, bony union, and so on. Now, because of the persistence of his complaint——

Mr. Reynolds: We better keep these separate. I offer to introduce these into evidence as Libelant's next in order. Better have them separated, I believe.

(The X-ray referred to was marked Libelant's Exhibit No. 3 in evidence.)

The Witness: Because of his persistence in reference to this difficulty of going up and down and having to go so long sideways with his feet, I decided to take a new series as of [69] 9/20/46, stereoscopic in character. The reason why I did this when I was trying to locate the reason why he complained that he had to go sideways up and down, we will say inclines up or down, I felt a tender spot in the lower third of his leg down here on pressure, and he said, "That is where the bone aches, and it aches down to my toes." So I took these stereoscopic pictures. This is taken from the fore back, what we call A-P, and that is of course almost similar to the ones prior. But this one I tilted at a little angle, this stereoscope, and you can see here is the front of the leg where this screw is pointing out into the tendons—that area (indicating).

Mr. Reynolds: All right. We will offer to introduce these exhibits that were taken in September of 1946 as Libelant's exhibit next in order.

(X-rays were marked Libelant's Exhibit 4 in evidence.)

(Testimony of Dr. James Eaves.)

Q. (Mr. Reynolds): Doctor, during the course of your examination did you note any atrophy in the injured leg?

A. Yes, but that could be ascribed to the lack of active use of that because of favoring it; it wasn't due to an actual disease, but you would say from disuse.

Q. Did you note any tenderness in the scar and the scar tissue?

A. Yes, the scar was tender and adherent to the underlying periosteum of the bone.

Q. Would that tend to cause any limitation of motion?

A. Not especially, because it is on the outer smooth shaft of the bone and not over the muscles.

Q. Now, Doctor, from your examination of Mr. Bovich in September of 1946, would you please state what the future will be as to that injury in that leg?

A. The scar is so adherent to the underlying bone that it could easily by the slightest bruise break down and become ulcerated, and those types of scars are always difficult to heal. But being young now it would be more fortunate. As he grows older that scar will give him trouble. Then to stop that complaint of his going up and down declines, I think the screw should be removed so that it doesn't hit the tendons—extensor tendons that supply the toe; then I think he would be free of that pain.

Mr. Reynolds: That is all.

(Testimony of Dr. James Eaves.)

Cross Examination

By Mr. Hoge:

Q. Doctor, in the reduction of this fracture, the doctor who performed the work got an excellent result?

A. Excellent as regard to the union of the bone.

Q. If there should be any infection or discomfort set up as a result of the pin that is there, it is very minor to remove it?

A. It isn't a serious operation to remove that.

Q. It requires about a week's disability, doesn't it?

A. I would say two to three.

Mr. Hoge: That is all.

Mr. Reynolds: That is all, Doctor.

I would like to recall Mr. Bovich to the stand.

THEODORE F. BOVICH

the libelant, recalled as a witness in his own behalf, and having been previously duly sworn, testified as follows:

Mr. Reynolds: May it please the Court, I have prepared a rough diagram with no attempt toward proportion, but merely to illustrate the testimony of the libelant in this case.

Mr. Hoge: Your Honor, I understand that counsel had rested his case with the exception of medical testimony and further argument, if he desired further argument.

(Testimony of Theodore F. Bovich.)

The Court: Is this argument now?

Mr. Reynolds: No, your Honor, I merely wish to have the libelant illustrate his testimony on this exhibit so that it could be——

The Court: You are asking to reopen the case as far as that is concerned?

Mr. Reynolds: Yes, your Honor.

The Court: I can't see any good reason for that. I would like to have you point out to me some authority for such procedure.

Mr. Reynolds: Well, if it please the Court, I believe when we finished here the other day in the morning and we were to proceed in the afternoon——

The Court: Yes.

Mr. Reynolds: You stated that I might present anything additional at that time. [72]

Mr. Hoge: Additional argument.

The Court: This is by way of argument, apparently.

Mr. Reynolds: No, your Honor; there are several things that I wish to show.

The Court: Well, what do you wish to show?

Mr. Reynolds: Well, I wanted to show the exact location of the crates on board the ship, and where the libelant was working at the time that this accident occurred.

Mr. Hoge: That has been gone into in detail, your Honor, heretofore, the exact location.

The Court: Yes, it seems to me that that is true, Mr. Reynolds.

(Testimony of Theodore F. Bovich.)

Mr. Reynolds: Well, there was something additional that I wanted to show your Honor.

The Court: I know, but you cannot reopen your case. You have tried your case; you have submitted your case, as I understand, except for the testimony of doctors.

Mr. Reynolds: It wasn't my understanding that it had been submitted at that time, your Honor.

The Court: No, it was not finally submitted, but the testimony, as I understand it, on both sides, was all in except the testimony of a doctor that you wished to bring here. Isn't that so?

Mr. Reynolds: Yes, your Honor.

The Court: Well, I think that answers it. I do not think [73] I am going to permit you to reopen this case and re-examine this witness on matters that have already been touched upon and upon which testimony has already been quite fully given. If you want to make it a part of your argument, you may; but so far as reopening it to take additional testimony, no.

Mr. Reynolds: Well, I did not have any exhibit, so I was going to have the libelant mark this for the purpose of argument.

The Court: I do not know of any rule of procedure in the trial of a suit of this kind that would permit you to do that. You can point out to me, if you will, please, something that will support your position.

Mr. Reynolds: Very well, your Honor. I won't go into that.

(Testimony of Theodore F. Bovich.)

May I ask the libelant one question involving the medical that was overlooked, your Honor?

The Court: Go ahead.

Q. (Mr. Reynolds): Mr. Bovich, I believe you stated that you did not return to work until September of 1946? A. That is right, sir.

Q. What was the reason that you did not return to work before that time?

A. I had a pain in my leg all the time.

Q. And you were unable to work before that date because of your leg, is that correct?

A. Yes, sir.

Mr. Reynolds: I think that is all. [74]

Mr. Hoge: No questions.

The Court: Have you been working at all since?

A. Recently I have, sir.

Q. What have you been doing?

A. Acetylene burner.

Q. What? A. Acetylene burner.

Q. That was work you had done before you had been injured? A. Yes, sir.

Mr. Reynolds: That is all.

The Court: Are you working now?

A. Yes, sir.

Q. And are you working at the same wages you did before? A. Yes, sir.

The Court: I think that is all.

Mr. Reynolds: The libelant has no further evidence, your Honor.

Mr. Hoge: Your Honor, we are prepared to show by the testimony of a doctor that this man

(Testimony of Theodore F. Bovich.)

had a remarkably good recovery, a full, complete recovery; but the court indicated when the matter was argued the other day that it is questionable whether the court would want to hear medical testimony from the respondent in the case, so we will not do so, unless the court desires.

The Court: I do not see any reason for requesting it. I have heard the testimony of the medical expert for the libelant. I do not wish to hear any more on that score.

(Testimony closed.) [75]

The Court: Now, do you wish to argue this matter?

Mr. Reynolds: Well, I think about everything was gone into thoroughly at the last hearing, your Honor. There is nothing very much I could add.

The Court: I was wondering if there was anything you would wish to add in addition to——

Mr. Reynolds: I would like to call your Honor's attention to a case entitled *Porello vs. United States*, at 153 Federal (2d) 605. That was a case in which a large crate containing a truck was being lowered into the hold of a ship. The foreman for the stevedoring company who was directing the operations of the winch and the lowering of this truck into the hold, ordered the winch driver to raise it. In so doing he did not observe that there were some strongbacks and hatch covers covering the hatch, and the truck struck this strongback, knocked the hatch covers off, and injured this workingman who was working in the hold of the ship. In that case

the court held that that was negligence upon the part of the foreman for the stevedoring company.

There was also an additional question of negligence involved because there wasn't a lock on this strongback that fell, and the court held that it was concurrent negligence, that both the ship was liable and the stevedoring company was liable.

I think that that is a direct parallel with this particular case where the stevedores were loading this ship; they [76] did not strike the strongback, but they swung this crate over and struck the crate behind which this Mr. Bovich, this seaman, was working, and it is for that reason that I feel that that constitutes negligence for which he would have a right to recover.

In addition to that there is one other case, 1946 Am. Maritime Reports, at page 1222. This is a case in which a seaman was injured by the negligence of a winch driver who was a soldier in the United States Army forces at the time. It would be similar to this case.

We are suing the United States of America here, and in this case that I have just cited the court held that the soldier was an employee of the United States, and was performing a maritime duty at the time, and therefore that would not preclude any recovery upon the part of the libelant who was injured due to his negligence.

The Court: Of course, I think that is so. The question would be, was there negligence? The fact that he might have been working for the Govern-

ment might not preclude recovery for negligence, if there was negligence.

Mr. Hoge: That is what that case held.

Mr. Reynolds: That is true, your Honor.

The Court: The question is whether there was negligence. I have already indicated to you in some remarks I made the other day that I didn't think there was any negligence. [77] You have a different view about that. I, of course, cannot contain in my own mind all of the testimony that was given here upon that subject. I don't know whether you would want to look into the subject of having the reporter transcribe the testimony.

Mr. Reynolds: I have had it transcribed.

The Court: If you have I would like to have it.

Mr. Reynolds: Yes, your Honor.

The Court: I will go over it carefully and see if it is sufficient to change my mind in that regard. But that is the impression that I got, as I told you the other day, and I still have that impression very strongly, that there was no negligence; that no negligence had been proved.

Have you any other cases you wanted to call my attention to on the negligence proposition?

Mr. Reynolds: Those are the only two I had right on negligence; the others are general.

The Court: Then you let me have a transcript of the evidence and I will read those two cases on the question of negligence.

Now, if I should hold that there was negligence, what do you claim or what do you contend that the

court should give to this man in the way of damages? What is your idea about that?

Mr. Reynolds: I believe that he should be compensated for his loss of wages during that period of time; that he should receive something for his pain and suffering over this period [78] of approximately nineteen or twenty months, and there should be some allowance for future disability. At the time that he was injured he was making \$360 per month, plus his board and lodging. It has been stipulated here that his maintenance is worth \$3.50 a day, which would bring it to roughly around another hundred dollars a month.

The Court: I am not speaking about maintenance now; I am speaking about damages for negligence.

Mr. Reynolds: Yes, your Honor, but I am talking about what he was earning at the time.

The Court: Yes.

Mr. Reynolds: \$360 a month plus an allowance of approximately \$100 a month for board and room would bring his earnings at that time to about \$460 a month. He was off work from January of 1945 until September of 1946, which would make about 19 months.

Mr. Hoge: He was paid his wages up to March 23, 1945.

Mr. Reynolds: Which would come to approximately \$8700.

The Court: You heard what counsel just said?

Mr. Reynolds: Yes, your Honor, I am just getting to that. He was paid his wages that came to

about \$400 up until the end of the voyage, which should be subtracted from that amount, and he was also paid maintenance of about, I think, \$350.

The Court: Don't confuse maintenance with damages for negligence.

Mr. Reynolds: I was subtracting that from this total [79] amount, your Honor.

The Court: You say the respondents here are guilty of negligence.

Mr. Reynolds: Yes.

The Court: In the event that I should hold they were, what damages do you claim the libellant is entitled to for negligence—damages for negligence, not maintenance and cure?

Mr. Reynolds: Well, roughly, he lost about \$7500 in wages during that period of time. I think that he should receive an additional \$3000 for pain and suffering, and an additional allowance of \$3000 for pain and suffering and loss of earnings in the future.

The Court: You are claiming then \$6000, and I don't get that. Is that for pain and suffering that is past and pain and suffering in the future? Is that it?

Mr. Reynolds: And disability in the future; yes, your Honor.

The Court: What?

Mr. Reynolds: Pain and suffering and disability in the future.

The Court: You are asking for damages for negligence: Now, I am asking you, in the event that I should hold that there was negligence here and

the libelant is entitled to damages for negligence, what amount of damages are you asking the court [80] to give him?

Mr. Reynolds: Well, the way I have just figured it out, your Honor, the total would come to \$13,500.

The Court: That would mean, first, there would be wages, \$7500——

Mr. Reynolds: Yes, your Honor.

The Court: Pain and suffering \$3000, and then future pain and suffering \$3000.

Mr. Reynolds: Future pain and suffering, and I would like to add disability, your Honor, from the testimony of the doctor.

The Court: Well, I can't see that, at all. In the event that I should allow your client damages for negligence, I can't see that suggestion you make as to \$3000 for additional pain and suffering. You are reaching so far into the future that you don't know what is going to happen.

Mr. Reynolds: That is true, your Honor, but we do know that he does have a leg there that isn't sound, that is subject to future injury and ulceration.

The Court: That is problematical. It may be, he might have discomfort, and he might not. In these days of high class surgery, he may get along very fine without any trouble at all, and probably will have no more difficulty than a person would who had never had any injury whatsoever. He is bound to have the little pains in his legs and his ankles, and all [81] parts of his body that every human

being has. It is probable that it wouldn't be fair to attribute them to this accident.

All right; we have the negligence end of it.

Let us take the maintenance and cure. In the event that I should hold you not entitled to claimed damages for negligence and should hold you are entitled to maintenance and cure, how much do you claim you are entitled to?

Mr. Reynolds: The claim for maintenance from December, which was his last payment, until March 6th, I believe, is 77 days at \$3.50 per day. Now, that amount would be undisputed.

We also claim that he would be entitled to maintenance for a further period of time, until September, when he was able to return to work, at the same rate, \$3.50 per day.

The Court: Well, how many days in all?

Mr. Reynolds: I haven't counted that up, your Honor.

The Court: Well, won't you do it now?

Mr. Reynolds: If I had a calendar I could, yes.

The Court: The clerk will give you one.

Mr. Hoge: It would be nine months.

The Court: No. He first asked for 77 days.

Mr. Hoge: Yes.

The Court: You are including the entire time, aren't you?

Mr. Hoge: Well, he was paid his last maintenance December 18, 1945. That would be just nine months to the day, practically. [82] He returned to work in September.

Mr. Reynolds: Nine months, your Honor, then for the whole thing.

Mr. Hoge: 270 days.

The Court: All right. Anything further?

Mr. Reynolds: I think that is all, your Honor, unless you have something.

The Court: No. Will you let me have your transcript?

Mr. Reynolds: Yes, your Honor.

The Court: Counsel, do you have something to say?

Mr. Hoge: Yes, your Honor.

Of course, if the court were going to consider the allowance of damages, we would like to have the opportunity of placing on the stand an orthopedist to testify the man has had an excellent recovery and he is completely well.

The Court: That is before me.

Mr. Hoge: And he isn't suffering any disability at all at the present; he has had a remarkably fine result.

The Court: Yes.

Mr. Hoge: As the court indicated, I can't see where there is any negligence here. The only thing that counsel could do would be to rely upon the doctrine of *res ipso loquitur*, which certainly wouldn't apply in this case.

This man was asked to do a very simple thing. He was asked to take some empty cans and carry them somewhere, [83] plain, ordinary ash cans, just as if he had been asked to sweep the deck, and he wasn't told how to do it or where to go. We then

say that he just created a trap for himself here. They were loading crates on the starboard side of this ship. The whole port side of the ship was free from anything. They had booms going across, but the loading was on the very side of the ship that he started to carry the cans through, if your Honor will recall, and in the movement a crate was moved and squeezed him, or something happened. But he was walking through a little space there between two crates that had been loaded, large crates in a position that no one could possibly have seen him.

There is no proof that anyone in authority even knew he was there, and he hid himself in between there in the most dangerous position that he could possibly have been in. The evidence shows—and I have it right here; your Honor will find it in the transcript, page 24, the cross-examination of Kazem-Beck—the port side of that ship had nothing on it whatsoever. He had a number of feet wide open. And we all know when they are loading and unloading, the booms are not constantly going. They will wait until they can get a load attached to it, then on a signal given it is raised up and it is carried across and the load is put down, then they have got to detach that to make it ready for use again.

If your Honor please, as I said on the hearing, he could [84] have waited and had the whole port side of that ship, where he could have been seen by anyone giving orders, or tending hatch, or giving signals. And if he had been in a position with the boom moving across—and the man himself admits that

you are not supposed to walk under a moving boom—they would have stopped the gear. But here he hid himself in a position where his own witness, Kazem-Beck, said he didn't go in there where this man went because it was dangerous to go there. That is in Kazem-Beck's testimony. He stuck himself in there where they load cargo in that part of the ship and got squeezed. There is no negligence here. I can't see by any stretch of the imagination how counsel can figure that there is any negligence on the part of the ship. It is simply a trap that he has created for himself. He could have taken the port side of the ship and he would have been safe, would have been right out there in the open, and he could have waited until the booms were not moving and the thing would never have occurred. This isn't a case where we have to meet the doctrine of *res ipso liquitur*. They must prove some negligence here, which they have not done.

The Court: Very well. Submitted.

Leave it with me, Mr. Reynolds, the copy of the transcript.

The Clerk: I have it here, your Honor.

Mr. Hoge: The maintenance will amount to \$945, your Honor.

The Court: How much is that? [85]

Mr. Hoge: Maintenance, 270 days at \$3.50 a day. I am using 30 days to the month. It might be two or three days more than that.

The Court: All right. [86]

[Endorsed]: No. 11620. United States Circuit Court of Appeals for the Ninth Circuit. Theodore F. Bovich, Appellant, vs. United States of America, Appellee. Apostles on Appeal. Upon Appeal from the District Court of the United States for the Northern District of California, Southern Division.

Filed: May 6, 1947.

/s/ PAUL P. O'BRIEN,

Clerk of the United States Circuit Court of Appeals
for the Ninth Circuit.

In the United States Circuit Court of Appeals
for the Ninth Circuit

No. 11620

THEODORE F. BOVICH,

Appellant,

vs.

UNITED STATES OF AMERICA,

Respondent.

DESIGNATION OF PARTS OF RECORD TO
BE PRINTED AND POINTS RELIED ON

The Appellant, Theodore F. Bovich, hereby requests that the record be printed in its entirety. Appellant adopts as his points on appeal the assignment of errors appearing in the record.

Dated, San Francisco, May 9, 1947.

/s/ THEODORE F. BOVICH,
Appellant.

/s/ By ALBERT MICHELSON,
His Proctor.

Copy Received this 9th day of May, 1947.

/s/ FRANK J. HENNESSY,
Proctor for Respondent.

/s/ By JOHN H. BLACK,

/s/ EDW. R. RAY,

Proctors of Counsel for
Respondent.

[Endorsed]: Filed May 9, 1947.